CASE NO. I 495/2001

SUMMARY:

TALITA LOFTY-EATON

VERSUS

GRAY SECURITY SERVICES NAMIBIA (PTY) LTD
RANDIE RICHARDS WAMBO
WINDHOEK COUNTRY CLUB & HOTEL

HOFF, J

2005/07/15

CIVIL ACTION

Acquilian action – damages for pure economic loss
Application for absolution of the instance at close of evidence on behalf of plaintiff – test restated – question of unlawfulness of omission of defendant to be decided based on whether a duty of care was owed.

Defendant, Security Company entered into agreement with client that protection services to be provided only in respect of property of client excluding protection services in respect of property belong to third parties. Public informed that parking of motor vehicles on property of client at own risk.
Plaintiff's vehicle stolen from premises.
Quere whether defendant owes duty of care to members of public who park vehicles on property of client that vehicles would be protected and defendant would be liable for damages or loss of such property

Enquiry encompasses the application of the general criteria of reasonableness, having regard to the legal convictions of the community as assessed by the Court.
The existence of a legal duty to prevent loss is a conclusion of law depending on all the circumstances of the case.

2.

Distinction between morally reprehensible conduct and legally actionable omissions *In casu* to find legal convictions of community require conduct of defendant as unlawful would be unjust, unreasonable and unfair.

CASE NO: I 495/2001

IN THE HIGH COURT OF NAMIBIA

In the matter between:

TALITA LOFTY-EATON **PLAINTIFF**

and

GRAY SECURITY SERVICES NAMIBIA (PTY) LTD **1ST DEFENDANT**

RANDIE RICHARDS WAMBO

2ND DEFENDANT

WINDHOEK COUNTRY CLUB & HOTEL

3RD DEFENDANT

CORAM: HOFF, J

Heard on: 2005.06.29

Delivered on: 2005.07.15

JUDGMENT:

HOFF, J: In an action for damages based on the *actio legis Acquiliae* plaintiff's claim is one of pure economic loss.

In her amended particulars of claim it is averred that as a direct result of the negligent and unlawful conduct of first defendant, plaintiff's vehicle had been stolen.

The evidence presented in support of the claim for damages was that at the time of the theft of the motor vehicle the daughter of plaintiff had been employed at the Windhoek Country Club and Hotel. On 23 March 1999 she parked plaintiff's motor vehicle, a Toyota Hilux bakkie, on the parking area at the Windhoek Country Club and Hotel. She subsequently discovered that the bakkie had been stolen whilst she was still in possession of the keys of the bakkie. The evidence was that a security guard (second defendant) employed by first defendant was on duty at the gate or boom giving access to the parking area. The daughter of plaintiff testified that she had been using her mother's vehicle for a period of two weeks prior to the theft of the vehicle, that she was known to second defendant, that second defendant had regularly seen her driving the said bakkie and that second defendant had given some explanation when confronted afterwards regarding the theft of the bakkie. Second defendant had subsequently left his employment and when plaintiff started leading evidence in support of her claim only first defendant was before Court. Second defendant being absent for reasons unknown this Court and the claim having been withdrawn against third defendant. The testimony of Batseba Vermeulen, the daughter of plaintiff, which evidence was not disputed, was that the procedure on entering the parking area

at the Windhoek Country Club and Hotel that a visitor would be issued with a card which had to be returned to the security personnel on duty at the gate when departing from the premises. Ms. Vermeulen also testified that the security guard would, in addition to receiving the card on exiting,

also look to see whether there was a key in the ignition of the vehicle exiting the premises. When she received the card she was under the impression that it was an insurance that the car would be safe if parked on the parking area and that second defendant would provide protection for the bakkie. She also contended that having regard to the wording on the card which she received the liability of first defendant is not explicitly excluded.

The back of this card reads as follows:

> ***"WINDHOEK COUNTRY CLUB***
>
> ***RESORT & CASINO***
>
> *Please retain this card on your person and return to Security in order to facilitate smooth exit form the WCCR premises. All parking is at owner's own risk. The Hotel accepts no responsibility for any theft or damage or to any person or vehicle whatsoever*.
>
> ***We value your property***
>
> GRAY SECURITY SERVICES
>
> We protect your profits"

Ms Vermeulen contended that the words *"We value your property"* on the card supports her assumption that first defendant would protect her mother's bakkie whilst it was on the premises of the Windhoek Country Club and Hotel. It was put to her by Mr. Dicks, who appeared on behalf of first defendant that, the words

referred to, merely reflect the logo of first defendant, and such logo cannot be interpreted that first defendant accepted liability for loss or damage to property belonging to third parties. It was also submitted that those cards were being issued jointly by first and third defendants.

It was common cause that the bakkie was never recovered and the person who removed the bakkie is unknown and had not been apprehended.

It was the plea of first defendant that *inter alia* in terms of an agreement entered into between first and third defendants that the protection services to be rendered by first defendant to third defendant *"are in respect of only the premises which are occupied"* by third defendant *"and the assets of third defendant and do not extend to any portion of the premises which are occupied by third parties nor to the assets of third parties unless specifically agreed to in writing between the parties to this agreement"* (first defendant and third defendant). It was accordingly agreed between first and third defendants that:

"*if the client (third defendant) permits any third party to occupy the premises or portion thereof or to store any assets on the premises or any portion thereof without the agreement in writing between the parties (first and third defendants) to this agreement then;*

the company (first defendant) shall incur no liability whatsoever for such third party;

the client (third defendant) shall advise such third party that it is occupying the premises or storing assets on the premises entirely at it's own risk;

the client (third defendant) hereby indemnify and holds the company (first defendant) free form liability against all and any claims of any nature whatsoever which may be made against the company (first defendant) by such third party."

It is common cause that neither plaintiff nor her daughter, Ms Vermeulen, entered into any agreement with first and third defendant regarding the protection of property brought onto the premises of third defendant.

It was also admitted by Ms Vermeulen that during the period when she had parked plaintiff's vehicle on the premises of third defendant that notices had been

displayed on the premises of third defendant to the effect that parking and entry onto such premises are entirely at owner's risk.

First defendant's plea on this issue was that plaintiff despite the knowledge and risk involved and whilst appreciating such risk nevertheless parked her motor

vehicle on the premises of third defendant and thus plaintiff consented to the risk of damage or theft or loss of her property.

In further particulars provided to first defendant plaintiff contended that first and second defendants had a duty of care towards plaintiff. In its plea first defendant denied that it owed plaintiff a duty of care or that it was under a legal duty to render security services in respect of the motor vehicle of plaintiff.

It was submitted by Mr. Grobler, who appeared on behalf of plaintiff that since plaintiff was not a party to the agreement between first and third defendants, there was no consensus between plaintiff on the one hand and first and third defendants on the other hand and therefore plaintiff is not bound by the terms of the agreement between first and third defendants. It was further submitted on behalf of plaintiff that since plaintiff did not park her motor vehicle herself on the premises of third defendant, that plaintiff had not been provided with a security card and therefor plaintiff had never reached any consensus with first defendant that her vehicle would be parked at owner's risk. Furthermore no allegation is

made that when the daughter of plaintiff parked the motor vehicle she did so as an agent for plaintiff.

It was in addition submitted that the words on the card *"parking is at own risk"* are general words applicable to anybody however these general words are restricted by the next sentence that the hotel accepts no responsibility thus the liability of first defendant to third parties is not specifically excluded.

It was finally submitted by Mr. Grobler that first defendant had a duty of care towards all people that use the parking area in the sense that their vehicles would not removed without following prescribed procedures. Thus a card was issued on entering the parking area which must be returned to the security guard who controlled the boom at the entry of the parking area. If the security guard allowed a vehicle to leave the parking area without having returned the card then such security guard would be negligent, that it must be inferred that first defendant rendered security services at the parking area of third defendant, and that the reasonable man would at least ensure that plaintiff's vehicle is not removed from the parking area.

At the closure of plaintiff's case Mr. Dicks on behalf of first defendant applied for absolution from the instance which application was opposed by Mr. Grobler.

The test to be applied at this stage is whether there was at the close of plaintiff's case evidence on which a reasonable man might hold that the defendant was liable.

In *Gascoyne v Paul and Hunter 1917 TPD 170 at 173* the test was stated as follows:

> *"The question therefor is, at the close of the case for plaintiff was there a prima facie case against the defendant Hunter; in other words, was there such evidence before the Court upon which a reasonable man might, not should, give judgment against Hunter ?"*

See also *Gafoor v Unie Versekeringsadviseurs (Edms) Bpk 1961 (1) 335 SA (A) at 340 A.*

It is trite law that the plaintiff must allege and prove that first defendant's omission was negligent and unlawful.

See *Eversmeyer (Pty) Ltd v Walker and Another 1963 (3) SA 384 TPD at 385 H.*

First defendant's request for further particulars regarding the facts on which plaintiff relies for the allegation that first defendant's conduct was negligent and unlawful was met with a reply that sufficient facts had been furnished in the particulars of claim to enable first defendant to plead. This does not appear to be the case. On the evidence of Ms Vermeulen it appears to me that plaintiff assumes that since a certain procedure was followed regulating traffic to and from the parking area that security services were therefor provided in respect of

all motor vehicles parked on the parking area and that a failure by the security guard to adhere to such a procedure rendered his conduct negligent. It appears to me from the testimony of Ms Vermeulen that it was also assumed therefor that the first defendant owed all owners of vehicles parked on the parking area anytime of the day or night a duty of care because of the provision of security services.

It was not denied that except for the security guard or guards at the entry to the parking area that no other security personal were deployed on the parking area itself with the aim of protecting all motor vehicles parked on the parking area.

It was further conceded by Ms Vermeulen that it is not difficult for anyone to obtain a card similar to those ones issued by the security guards and that a person who returned such card would be allowed to exit with a motor vehicle from the parking area. Ms Vermeulen's answer to this proposition was that the security guard had seen her for a period of two weeks prior to the theft of her

mother's motor vehicle, driving that specific vehicle and should not have allowed someone else to remove such vehicle.

I shall for the purposes of this application assume that the factual evidence presented on behalf of plaintiff is true.

(See *Atlantic Continental Assurance Co. of SA vs Vermaak 1973 (2) SA 525 ECD at 527 C – D)* and I am also mindful of what was stated in Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403 (A) at 409 G that the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court might find for plaintiff.

The security guard did not testify and there is no admissible evidence as to what transpired between the security guard and the suspect who removed plaintiff's vehicle. It is not improbable that the suspect could have provided the security guard with a card, or in the absence thereof, could have given an acceptable explanation to the security guard.

Our law recognises that in certain circumstances the legal convictions of the community imposes a legal duty upon members of society to act positively in those instance where a duty of care is owed.

In *Minister van Polisie v Ewels 1975 (3) SA 590 (A) at 597 A – C* it was held that: (Quotation from headnote).

> *"Our law has developed to such a stage wherein an omission is regarded as unlawful conduct when the circumstances of the case are of such a nature that the omission not only indicates moral indignation but also that the legal convictions of the community demand that the omission ought to be regarded as unlawful and that the damage*
>
> *suffered ought to be made good by the person who neglected to do a positive act. In order to determine whether there is unlawfulness the question, in a given case of an omission, is thus not whether there was the usual "negligence" of the bonus paterfamilias but whether, regard being had to all the facts, there was a duty in law to act reasonably".*

In *Minister of Law and Order v Kadir 1995 (1) SA 303 (A)* the plaintiff sought to recover damages allegedly suffered on account of his inability to claim compensation for personal injuries from the Multilateral Motor Vehicle Accidents Fund since the police officers who attended the scene of the accident failed to take down the necessary information relating to the driver and the partculars of the other vehicle. It was alleged that the policemen's failure constituted a breach of a legal duty which they owed to plaintiff.

In considering the issue of legal duty *Hefer JA said the following at 319 I – J and 320 A – B:*

> *"Society would surely not condemn all omissions equally harshly and would not, for example, regard a failure to summon a tow truck in the same light as a failure to summon an ambulance or to render assistance to a victim trapped in the wreckage… .Moreover, in gauging the depth of popular disapproval of any particular omission, one should constantly bear in mind that the age-old problem of the distinction between morally reprehensible and legally actionable omissions is a lasting one which has not been solved by the mere recognition of societal attitudes and public and legal policy as determinants of the existence of a legal duty to prevent economic loss to others."*

I endorse the sentiments expressed *supra*. In my view it would also be apposite to quote at length what was said by *Botha JA in Knop v Johannesburg City Council 1995 (2) SA 1 SA (AD)* in his discussion of the concept of duty of care.

Referring to the English author *Milner* in his work *Negligence in Modern Law (1967) the following appears at 27.*

> *"The duty concept in negligence operates at two levels. At one level it is fact-based, at another it is policy-based. The fact-based duty of case forms part of the enquiry whether the defendant's behaviour was negligent in the circumstances. The whole enquiry is governed by the foreseeability test, and "duty of care" in this sense is a convenient but dispensable concept. On the other hand, the policy-based or national duty of care is an organic part of the tort;; it is basic to the development and growth of negligence and determines its scope, that is to say, the range of relationships and interests protected by*

it. Here is a concept entirely divorced from forseeability and governed by the policy of the law. "Duty" in this sense is logically antecedent to "duty" in the fact-determined sense. Until the law acknowledges that a particular interest or relationship is capable in principle of supporting a negligence claim, enquiries as to what was reasonably foreseeable are premature."

The learned Judge of Appeal continued on 27 E – I as follows:

"As is evident from the passage quoted from Millner, and from the clear distinction in our law between fault and unlawfulness…. the enquiry into the existence of a legal duty is discreet from the enquiry into negligence. Nor can

the mere allegation in the particulars of claim that Council was under a legal duty to take steps to prevent loss being caused to plaintiff carry the day for him. The existence of the legal duty to prevent loss is a conclusion of law depending on a consideration of all the circumstances of the case. The general nature of the enquiry as stated in the well-known passage in Fleming The Law of Torts 4th ed at 136 quoted in the Administrateur, Natal case supra at 833 in fine 834 A:"

"In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty many factors interplay; the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the incidence and extent of duties are liable to adjust in the light of the constant shifts and changes in community *attitudes."*

> The enquiry encompasses the application of the general criterion of reasonableness, having regard to the legal convictions of the community as assessed by the Court."

In considering the issue of duty of care Hannah J in *Namibia Machine Tools (Pty) Ltd v Minister of Works, Transport and Communication 1997 NR 18* tried the issue on another ground and the following appears at 26 H – J and 27 a:

> *"However the test or criterion of a duty to act is not forseeability alone. In order to reach a policy decision whether a duty of care exists I have to have regard to the legal convictions of the*
>
> *community. When dealing with this I find myself more at ease asking myself what the community would consider to be fair, just and reasonable in all the given circumstances. To do so is not in my view a departure, from the formula laid down in Ewels case supra because it is almost inevitable that such considerations will underlie the legal convictions of the community. The only real difference is one of form not substance. And, as I have said I find it more comfortable to approach the question in terms of recognisable concepts such as fairness, justice, and reasonableness as do the English Courts."*

The question which firstly must be decided in this action is whether there was a legal duty on first defendant to prevent economic loss to all third parties, including plaintiff, who parked their vehicles on the parking area of third defendant. Would the legal convictions of the community regard it as reasonable to impose such a duty of care on first defendant or to put it in another way would it be fair and just to do so ? If it is found that there is no such legal duty then first

defendant's conduct or omission cannot be said to be unlawful and that would be the end of the enquiry.

In considering the circumstances of this case I am of the view that the questions posed *supra* must be answered in the negative.

In my view it is immaterial who parked plaintiff's vehicle on the parking area. To find that the legal convictions of the community require that a breach of the alleged duty as contended by plaintiff be regarded as unlawful would in my view be unjust, unreasonable and unfair. It would expose not only first defendant but all other firms who render security services to a multiplicity of claims. It was

conceded by Ms Vermeulen that hundreds of motor vehicles enter onto and exit the premises of third defendant during the day and at night. Would it be reasonable to impose a legal duty on first defendant under these circumstances to prevent economic loss to third parties ? I think not. In practical terms security firms would either have to increase security personnel substantially in order to prevent a breach of such a duty of care, resulting in an inevitable additional financial burden, or in the absence of increasing personnel, face claims which may ruin firms financially.

I can understand that plaintiff's daughter felt it safe to park the motor vehicle on the parking area. However I can find no merit in the argument that the liability of first defendant for loss or damage to the property of third parties were not excluded. The undisputed evidence was that members of the public were

informed when cards were issued at the entrance by security personnel, that parking was at own risk, and in addition, on the parking area itself the same information was displayed. There is in my view no admissible evidence that second defendant acted either negligently or intentionally when he allowed plaintiff's vehicle to pass through the boom.

In the light of my finding that first defendant owed no general duty of care to third parties including plaintiff, the submission that plaintiff was not a party to the agreement between first and third defendant's excluding the liability of first defendant in respect of loss of or damage to the property of third parties, becomes irrelevant.

Having heard the evidence on behalf of plaintiff it was clear to me that there was no real dispute of facts. In addition the defence of first defendant is not something peculiarly within the knowledge of the first defendant. This Court was required to make a value judgment which it did.

I am accordingly of the view that there is no *prima facie* evidence that first defendant was liable or to put it differently, there is no evidence upon which a reasonable man might find for the plaintiff.

In the result the following order is made:

Absolution from the instance is granted with costs.

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HOFF, J

ON BEHALF OF THE PLAINTIFF: ADV. GROBLER

Instructed by: GROBLER & CO.

ON BEHALF OF THE DEFENDANT: ADV. DICKS

Instructed by: THEUNISSEN, LOUW &

PARTNERS