NOT REPORTABLE

CASE NO.: I 1497/2008

IN THE HIGH COURT OF NAMIBIA

In the matter between:

ABSOLUTE LOGISTICS (PTY) LTD **Plaintiff**

and

ELITE SECURITY SERVICES CC **Defendant**

CORAM: **PARKER J**

Heard on: 2010 February 10; 2010 February 17-18; 2010 March 25; 2010 November 15; 2010 November 17

Delivered on: 2011 March 17

JUDGMENT

PARKER J: [1] The plaintiff instituted action against the defendant in which the plaintiff claims damages in the amount of N$53, 589.50 upon breach of contract as treated *infra;* alternatively, upon the basis of delictual liability that the defendant's guards (employees) were negligent in the performance of their duty as treated below. The plaintiff carries on the business of, among other things, storing on its premises and transporting therefrom all manner of goods belonging to its clientele. The defendant is a close corporation whose main business is providing security-guard services to its clientele.

[2] The plaintiff's case is simply the following. In terms of a contract concluded between the parties, i.e. Exh. 'A', dated 26 May 2006 (annexed to the plaintiff's Particulars of Claim), for payment of an agreed amount of money, the defendant provided security-guard services at the plaintiff's business premises at 13 Holstein Street, Lafrenz Township, Windhoek ('the premises') from Monday to Friday as follows: that is, from 19H00 to 07H15 the following day ('night shift'). I find that the terms of the said written agreement in Exh. 'A' were amended to include the defendant providing security-guard services during weekends also. Thus, on the totality of the evidence, I also find that the weekend time slot was from 19H00 on Friday to 07H15 on the succeeding Monday (Sveekend shift'). According to Mr De Villiers, a driver of the defendant and a defence witness, the drop-off time of the guards at the premises varied between 07H15 and 08H30 and between 18H15 and 18H45 daily. This does not detract from the reasonable factual finding I have made above regarding the time slots of both shifts. I also find on the evidence that the contract was partly written (Exh. 'A') and partly oral.

[3] The claim resting on the contract is that the defendant breached the contract in that between 4-13 September 2006 two cable drums, containing copper cable rolls, disappeared from the premises and as a result the plaintiff suffered damages in the sum of N$53, 589.50 being the cost of the aforementioned drums. The alternative claim is delictual; that is to say, the plaintiff alleges that due to the negligence of the defendant's guards in the performance of their duty the drums disappeared from the premises. In this regard Mr Jensen, the owner of the plaintiff, testified that the drums disappeared from the premises during 4-13 September 2006, and the disappearance of the drums was discovered during stocktaking on 13 September 2006.

[4] The plaintiff called Mr Jensen and Mr Wrede, as plaintiff witnesses. They testified that the drums could not have been stolen and carried away from the premises during the daytime on a weekday when the defendant's guards were not on duty at the premises, but during a time when the defendant's guards were on nightshift or weekend shift duty.

[5] As respects the claim based on the allegation of breach of contract; the singlemost issue to determine is this: did the defendant breach the contract? This must in turn perforce be considered together with the issue as to whether the drums disappeared when the premises were under the charge of the defendant's security guards or when the defendants were not on security-guard duty either on night shift or weekend shift.

[6] The testimonies on either side of the suit concerning the crucial issue as to when the drums disappeared from the premises present mutually destructive versions. In that event,

> 'I must follow the approach that has been beaten by the authorities in dealing with such eventuality; that is to say, the proper approach is for the Court to apply its mind not only to the merits and demerits of the two mutually destructive versions but also their probabilities and it is only after so applying its mind that the Court would be justified in reaching the conclusion as to which opinion to accept and which to reject. (See *Harold Schmidt t/a Prestige Home Innovations v Heita* 2006 (2) NR 555 at 559D.) Additionally, from the authorities it also emerges that where the onus rests on the plaintiff and there are two mutually destructive versions, as aforesaid, the plaintiff can only succeed if the plaintiff satisfied the Court on a preponderance of probabilities that the plaintiff's version is true and accurate and therefore acceptable, and that the version on the opposite side is false or mistaken and should, therefore, be rejected. *(National Employers' General Insurance Co. Ltd v Jagers* 1984 (4) SA 437 (E); *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others* 2003 (1) SA 11 (SCA); *Shakusheka and Another v Minister of Home Affairs* 2009 (2) NR 524; *U v Minister of Education, Sports and Culture* 2006 (1) NR 168)'

[7] Jones J put it succinctly thus in *Mabona and Another v Minister of Law and Order and Others* 1988 (2) SA 654 (SE) at 662 C-F:

> The upshot is that I am faced with two conflicting versions, only one of which can be correct. The *onus* is on each plaintiff to prove on a preponderance of probability that her version is the truth. This *onus* is discharged if the plaintiff can show by credible evidence that her version is the more probable and acceptable version. The credibility of the witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of a plaintiff's version, an investigation where questions of demeanour and

> impression are measure against the content of a witness's evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety *(National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E)).'

Those approaches were applied recently by this Court in *Ephraim Kahorere and Others v Minister of Home Affairs and Others* Case No. A 292/2008; and that is the manner in which I approach the resolving of the mutually destructive versions on both sides of the suit.

[8] It is not disputed that the cable drums were extremely heavy and none of them can be lifted and thrown over the wall by personal human effort. The small drum weighed 50.50 kg and the bigger one 387 kg. Indeed they are loaded unto trucks by the use of a forklift which the plaintiff occasionally borrowed from a neighbouring business house. In this regard it was the defendant's case that some employees of the plaintiff could 'have used a forklift to lift the drums over the wall'. As respects this; Mr Bugan, counsel for the defendant, made a spirited submission that Mr Wrede confirmed in his cross-examination-evidence that the possibility that such was done existed. Mr Prinsloo, the owner of the defendant also testified. In his evidence, Prinsloo testified that as he saw it, the drums disappeared from the premises in the daytime on a weekday, that is, when the guards were not on duty. Thus, for Mr Bugan, Wrede's testimony supports Mr Prinsloo's testimony that the drums disappeared from the premises during the daytime through the use of a forklift or a vehicle which 'they', (i.e. the thieves) drove through the gates of the

premises and once out of the premises, they (the thieves) 'threw it over the wall into the Trustco premises'. I do not share Mr Bugan's enthusiasm: Mr Wrede's terse and forthright answer was, 'It is possible, Yes'. Mr Wrede did not say it was certain or probable.

[9] The inspection *in loco* revealed that the open space of the premises is not a wide and large area. And Mr Jensen testified that he had a very slim complement of employees and a new business at the material time. I gained the distinct impression that during working hours the open space would not be abuzz with a multitude of employees going to-and-fro about their business there; neither would visitors be wandering pell-mell in the open space. The plaintiff is not in the manufacturing or trading business, necessitating crowds of traders and shoppers going in and out of the premises to sell or purchase goods. I have mentioned previously the type of business the plaintiff was engaged in.

[10] Additionally, a forklift is not a non-motorized vehicular catapult capable of hurling the heavy drums over the wall of the premises with the height of 2.4 m in a split second without anybody on the premises noticing the action - if it was done during the hours of daytime on a weekday when the defendant's guards were not on duty. The forklift is a motorized vehicular truck. Someone would have to climb into the driver's seat, start the ignition, engage the appropriate gear, drive the forklift to where the drums lay on the ground, lift them - unto the forklift, drive the forklift for a distance and drop the drums over the wall while the forklift is on the premises or drive the forklift with its load of drums through the gates of the premises; and nobody in the open space of the premises noticed the motions and manoeuvres described. To accept that that is

how the drums were carried away from the premises during the daytime on a weekday when the defendant's guards were not on duty is to accept that some legal practitioners do not drive or walk to the Court; they fly because they want to get to the Court very quickly.

[11] The other scenario emerging from the evidence is that the cable drums were removed from the premises by unrolling the copper cable rolls and thereafter cutting them up into pieces or pulling the unrolled copper cable rolls over the wall. Such action will not take less than two hours to complete. In this regard, I accept the testimony of Mr Stynberg, a defence witness, that one drum casings and pieces of casings and chips were found at the Trustco yard that adjoins the premises. But his evidence does not add much to the contest.

[12] I have applied my mind not only to the merits and demerits of the mutually destructive versions but also to their probabilities. I have also weighed all that on the scales of common sense and human experience. (See *Bosch v The State* [2001] BWCA 4 at 44 (Court of Appeal) where the relevance of common sense and human experience are said to be crucial in the weighing of evidence and applied by this Court in *The State v Manuel Alberto da Silva* Case No. CC 15/2005) (Unreported).) Having done all that I am impelled to the following crucial factual finding. The drums disappeared from the premises during the time that the defendant's security guards were on duty in terms of the contract - either on night shift or weekend shift.

[13] Having so found; the question is: is the defendant liable? That is the question I now proceed to answer. Mr Bugan's submission verbatim is that 'if

the defendant's guard(s) really wanted to steal these copper cable drums, it would have been easier for them to just load them on a truck or whatever and drive it to another place far away from the plaintiff's premise and dismantle them at their own time and pace ... That is why it is our submission that it was the employees of this plaintiff who removed these items and hurriedly threw it over the wall as they did not have the time to transport it to another place'. With respect, Mr Bugan's argument falls to be rejected as baseless for several reasons. It has not been shown that the guards of the defendant have the same I.Q. as Mr Bugan who is a legal practitioner; but more important, it is not the case of the plaintiff that the guards of the defendant did 'steal' the drums and their copper rolls. The plaintiff's case is rather that the defendant in breach of its contractual obligation to guard the premises and their contents, including the drums, failed in that department of their contractual obligation and by so breaching their contractual obligation, the plaintiff, as the innocent party to the contract, has suffered damages caused by the breach. In my opinion, therefore, there is a nexus between the breach and the damages (See Christie, *The Law of Contract in South Africa* 5th edn. p. 550 and the cases there cited.)

[14] For all the aforegoing and the crucial factual finding I have made previously, I have no difficulty in coming to the inevitable and reasonable conclusion that the said breach is a material breach of an essential term of the contract and therefore the plaintiff as the innocent party was entitled to cancel the contract and sue for damages, as it has done in the instant action. (See Christie, ibid. pp. 538-542 and the cases there cited.) Accordingly, I hold that the plaintiff has established on a preponderance of probabilities that the breach of the said contract caused the damages suffered by the plaintiff and the defendant is liable. It follows that in my judgment, the plaintiff succeeds in its claim in contract. Having so concluded, it serves no purpose to consider the plaintiff's alternative claim based on delict.

[15] Whereupon, I make the following orders:

(1) Judgment for the plaintiff in the amount of N$53, 589.50, plus interest thereon at the rate of 20% per annum, calculated from the date of issuance of the summons, being 13 May 2008.

(2) The defendant must pay the plaintiff its costs.

PARKER J

COUNSEL ON BEHALF OF THE PLAINTIFF:

Mr S Horn

Instructed by: M B De Klerk & Associates

COUNSEL ON BEHALF OF THE DEFENDANT:

Mr D Bugan

Instructed by: P D Theron & Associates