

## **WHO GUARDS THE GUARDIANS? LIABILITY FOR BREACH OF CONTRACT**

*Loureiro v iMvula Quality Protection (Pty) Ltd* (09/15228) [2011] ZAGPJHC 140 (30 Sept 2011)

*iMvula Quality Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA)

*Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC)

### *1 Introduction*

The matter of *Loureiro v iMvula Quality Protection (Pty) Ltd* (2014 3 SA 394 (CC)) dealt with the vexed question of liability where a security service provider had apparently failed to prevent a house invasion and robbery from taking place. It is one of those cases where the same facts apparently gave rise to claims for breach of contract and in delict. Firstly, the court had to decide whether a security service provider could be liable for breach of contract towards its client where a house invasion and robbery took place while the property was under protection of the security service provider. Secondly, the court also had to decide whether a security service provider could be liable in delict towards third parties who were caught up in the house invasion and robbery that took place while the property was under protection of the security service provider. While the action involved both claims

in delict and a claim for breach of contract, this note will only deal with the issue of breach of contract and the claims in delict will not be discussed.

## 2 Facts

Loureiro and his family moved into their new house in Melrose during November 2008. Because he and his family had previously been the victims of an armed robbery, Loureiro installed a comprehensive security system in the new house. This included an electric fence, perimeter protection, infrared beams, multiple alarm systems and closed circuit television, as well as a guard house with an intercom. Loureiro also requested his nephew to arrange a 24-hour service of armed guards to be stationed at the house. The nephew employed iMvula for this purpose. iMvula began posting guards to the house in December 2008 (408G-J).

There was no written contract for the rendering of the guard services, but iMvula invoiced Loureiro for the provision of “armed grade D security officers” (*Loureiro v iMvula Quality Protection (Pty) Ltd* (09/15228) [2011] ZAGPJHC 140 par 37). The payment due in terms of the invoice was made from the family business, Combined Ceilings and Partitions CC, in which Loureiro, his father and his nephew held membership (par 40).

When the guards allowed access to visitors without first obtaining authorisation from the occupants of the house, Loureiro partially disabled the intercom system so that the gate could no longer be opened from the guard house, but only from within the house. To facilitate access to the guards during changes of shifts, Loureiro provided a key to a pedestrian gate, with strict instructions to use it only to facilitate shift changes and not to allow any other person to access the premises through this gate (409A-B).

On 22 January 2009, iMvula posted an unarmed grade A security guard to the house. During the evening, a white motor vehicle with a flashing blue light stopped in the driveway of the house. A passenger, who appeared to be wearing a police uniform got out and showed the guard what appeared to be a police identity card through the bullet proof glass of the guard house. The guard attempted to speak to the “policeman” through the intercom installed in the guard house, but got no reply. He then went to the pedestrian gate and when he unlocked the gate, he was confronted by a gang of armed robbers who put a firearm to the guard’s head and forced their way onto the premises (409B-H).

After an ordeal lasting several hours during which the members of the household were held at gunpoint and restrained, the robbers made off with loot to the value of approximately R11 million (409H-410A).

As a result of the inability of the security guard to protect the Loureiros during the robbery, Loureiro instituted action for damages against iMvula in the South Gauteng high court. Loureiro based his claim on breach of the security services contract, while claims in delict were also instituted for the losses and trauma suffered by Loureiro’s wife and two sons (410A-C).

## 3 Judgment

In so far as the claim on breach of contract is concerned, the judgment in the court of first instance (*Loureiro v iMvula Quality Protection (Pty) Ltd* 2011 ZAGPJHC 140) and the majority judgment in the supreme court of appeal (*iMvula Quality*

*Protection (Pty) Ltd v Loureiro* 2013 3 SA 407 (SCA)), are both largely concerned with the reasonableness of the guard's actions on the night in question.

In the court of first instance Satchwell J explained that

“the liability of defendant (whether on claim A in contract or claim B in delict) essentially boils down to the question of negligence. Did the company fail to carry out its obligations in terms of the contract? Did the company fail to enable its security guard to meet the terms of the contract? Did the company enable its security guard to meet the standard reasonably required of a security guard? Did the security guard meet the standard reasonably required of a security guard? What was the ‘duty of care’, if any, expected of the security company and its servant and was there a failure to meet such standard?” (par 43).

She concluded (par 54) that there was breach of contract, as iMvula was negligent in that it had failed to take reasonable steps to prevent intruders from gaining access to the premises and had failed to meet the standards required of a security company. In addition, she concluded (par 55 *et seq*) that a reasonable security guard would have been more vigilant and that his negligence also constituted breach of contract.

On appeal the majority of the supreme court of appeal held, per Mhlantla JA, that the security guard had not acted negligently when he opened the gate (417G-418A). Since there was no blameworthy conduct on the part of the security guard, he concluded that no breach of contract had occurred. In his minority judgment, Cloete JA concluded (421H-422A) that when the security guard used the key to the pedestrian gate for a purpose other than to change shifts, the guard committed breach of contract and held that the reasonableness of the guard's conduct was entirely irrelevant.

On further appeal the constitutional court (*Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 3 SA 394 (CC)), in a unanimous judgment handed down by Van der Westhuizen J, held that Loureiro had contracted with iMvula “to provide a 24-hour service of armed guards to be placed at his home” (par 9). In so far as the claim for breach of contract is concerned, Van der Westhuizen J found that iMvula had failed to fulfil its obligations and held that iMvula was liable to Loureiro for breach of contract (par 3, 46, 48).

## 4 Discussion

### 4.1 Claims on contract and in delict

When the same facts apparently give rise to claims in both contract and delict, there is an abject risk that the lawyers and judges involved could place too much emphasis on the facts that appear identical for both claims and lose sight of the applicable legal principles that are fundamentally different. This creates a major risk that they can confuse the two distinct causes of action and apply delictual principles in deciding contractual claims or *vice versa*. In *Freddy Hirsch Group (Pty) Ltd v Chickenland (Pty) Ltd* (2011 4 SA 276 (SCA)), Ponnann JA warned:

“It is clear that the same facts may give rise to a claim for damages both *ex contractu* and *ex delicto*. But the breach of a contractual duty is not per se wrongful for the purposes of Aquilian liability. Admittedly, there is an important factor present in contract and absent in delict – that is, the competence of the parties to regulate, limit or expand by arrangement among themselves the consequences of any prospective breach. ... A contract, it has been said, is the ‘ultimate limiting device’; moreover, the duty in question is not imposed on the defendant by operation of law – it is one that the defendant was prepared to voluntarily assume” (292F-H).

And in *Wagener v Pharmacare Ltd; Cuttings v Pharmacare Ltd* (2003 4 SA 285 (SCA)), Howie P stated that

“[c]ontract and delict, being quite separate branches of the law, have their own principles, remedies and defences. One cannot, because of the absence of contractual privity between the injured party and the manufacturer, simply graft warranty liability onto a situation patently governed by the law of delict” (296C).

There is clearly a fundamental difference between claims in delict and claims for breach of contract. A party who institutes a claim in delict needs to prove that the defendant committed an act (or omission), which is culpable and wrongful and which has caused damage or harm to the plaintiff. On the other hand, a party instituting a claim for breach of contract needs to prove that a valid contract was concluded between the plaintiff and the defendant, that the contract imposed certain duties on the defendant, that the defendant has failed to fulfil those duties or given a clear indication that it will not fulfil those duties and that the plaintiff has suffered damages as a result of such failure.

Furthermore, the nature of a claim in delict and a claim for breach of contract is different. In *Trotman v Edwick* (1951 1 SA 443 (A)) Van den Heever JA explained that

“[a] litigant who sues on contract sues to have his bargain or its equivalent in money or in money and kind. The litigant who sues on delict sues to recover the loss which he has sustained because of the wrongful conduct of another, in other words that the amount by which his patrimony has been diminished by such conduct should be restored to him” (449B-C).

It is therefore crucial that, in any situation where the same facts apparently give rise to a claim in delict and a claim for breach of contract, emphasis should always be on the nature of the claim first, and the focus should thereafter shift to the facts required to prove the particular kind of claim. Unfortunately, in practice lawyers and judges often reach intuitive conclusions first and then search for legal rules to justify those conclusions (Lategan “Die uitleg van wetgewing in hermeneutiese perspektief” 1980 *TSAR* 107 109). As a result, too much emphasis is sometimes placed on the desired outcome and the facts that appear similar so that the unique legal nature of each claim may be lost in the process.

The conclusion by Satchwell J in this case that “the liability of defendant (whether on claim A in contract or claim B in delict) essentially boils down to the question of negligence” is therefore quite unfortunate (par 43). By clearly failing to distinguish between the claim for breach of contract on the one hand, and the claims in delict on the other, the legal nature of the various claims was disregarded and the judgment became mired in confusion.

This set the tone for the confusion to continue in the supreme court of appeal. The majority, per Mhlantla JA, questioned “whether the conduct of the guard in opening the pedestrian gate constituted negligence and is causally linked to the damages sustained by the respondents”, without apparently considering that Loureiros’ claim was based on breach of contract, while his wife and sons claimed in delict (411C-E). As a result, the fundamental difference between claims in delict and claims based on breach of contract, as explained in *Trotman v Edwick* did not receive their consideration. The end result was that some fundamental principles of the law of contract were completely disregarded by the court of first instance and the supreme court of appeal.

The constitutional court avoided this pitfall. Van der Westhuizen J stated from the outset that the

“issues for determination are:

- (a) Should leave to appeal be granted?
- (b) Is iMvula liable for breach of contract?
- (c) Is iMvula liable in delict for the Loureiros’ loss?” (par 6).

There is a clear separation of the contractual and delictual issues in his judgment, and Van der Westhuizen J appears to focus on the nature of each claim and the facts required to prove each particular claim. As a result, the constitutional court did not allow itself to get bogged down by the repetitive nature of the pleadings. At least as far as the claim for breach of contract is concerned, the constitutional court stayed true to the fundamental principles of the law of contract and restored some sanity to the matter.

## 4.2 Privity of contract

The doctrine of privity of contract is arguably one of the most fundamental principles of the law of contract (*Cullinan v Noordkaaplandse Aartappelkernmoerkwekers Koöperasie Bpk* 1972 1 SA 761 (A) 770D-H). Hutchinson and Pretorius (*Law of Contract* (2013) 21) refers to privity of contract as one of the cornerstones of the law of contract. In *Bowring v Vrededorp Properties CC* (2007 5 SA 391 (SCA) 396H), Brand JA explained that “[t]he notion that B can be allowed to claim performance against C of a contractual undertaking by A is clearly an anomaly – in that it flies in the face of contractual privity”.

And in *Sefalana Employee Benefits Organisation v Haslam*, Marais JA held:

“If an offeror has contracted unconditionally to buy shares from a shareholder a repudiation by the offeror of the agreement may well entitle the offeree to damages. But a shareholder to whom no offer has been extended, let alone accepted, and with whom there is therefore no contractual privity is in a very different position. ... A reading which gratuitously confers upon shareholders with whom there is no contract the same benefits as those with whom there is a contract ... is, to my mind, unjustified and inherently unlikely to have been intended” (2000 2 SA 415 (SCA) 419G-J).

In other words, a contract generally operates only between the parties (*Wynland Construction (Pty) Ltd v Ashley-Smith* 1985 3 SA 798 (A) 817H *et seq*), and in general only the parties to a contract, and no-one else, acquire rights to claim performance and incur liability to render performance in terms of that contract (the *Cullinan* case 770D-H; see also *Pfeiffer v First National Bank of SA Ltd* 1998 3 SA 1018 (SCA) 1025E-H). This means further that only a party to a contract can commit a breach of that contract, and that the conduct of a third party cannot constitute breach of that contract, while only the party to a contract can in general seek redress for breach of that contract (*Sweets from Heaven (Pty) Ltd v Ster Kinekor Films (Pty) Ltd* 1999 1 SA 796 (W) 800E-F).

In the *Loureiro* case Satchwell J in the court *a quo* concluded (par 42) that a contract had in fact been concluded between Loureiro and iMvula. This conclusion was confirmed on appeal by the majority per Mhlantla JA (413E) and the minority per Cloete JA (419G). On the doctrine of privity of contract, as discussed above, this would then mean that only Loureiro and iMvula, as the parties to the contract, were bound in terms of the contract, only Loureiro and iMvula, as parties to the contract, acquired any rights and duties in terms of the contract, only Loureiro and iMvula, as parties to the contract, acquired any liability in terms of the contract and consequently only Loureiro and iMvula, as parties to the contract, could commit breach of that contract.

Then why did Satchwell J pose the question: “Did the company fail to enable its security guard to meet the terms of the contract?” (par 43). Surely, if the contract was between Loureiro and iMvula, only Loureiro and iMvula acquired any rights and duties in terms of the contract and it was certainly not incumbent on the security guard, who was not privy to the contract, to “meet the terms of the contract”. There was no contractual relationship between the guard and Loureiro and therefore no grounds on which the guard could incur any duty *ex contractu* towards Loureiro to “meet the terms of the contract”.

And why did Satchwell J, after analysing the conduct of the security guard at length (par 50-66), conclude “that the acts identified above constitute, individually and together, breaches of contract” (par 67)? Surely, if the contract was between Loureiro and iMvula, only Loureiro and iMvula could commit breach of that contract. The guard, not being privy to the contract between Loureiro and iMvula, could not, irrespective of his conduct during the night in question, commit a breach of the contract between Loureiro and iMvula. Again, there was no contractual relationship between the guard and Loureiro and therefore no grounds on which the guard could commit breach of contract towards Loureiro.

This unfortunate indifference to the doctrine of privity of contract could certainly have been, as Satchwell J explained

“by reason of the apparent lack of preparedness on the part of plaintiff’s counsel [and] ... failure to prepare on the legal issues (such as the identity of the contracting parties ...) ... There was a sense of confusion throughout the presentation of the plaintiffs’ case and arguments thereon” (par 6).

However, paragraph 8 of the amended pleadings for the plaintiff (*Loureiro v iMvula Quality Protection (Pty) Ltd* [2011] ZAGPJHC 140 n 19), which deals with Loureiro’s claim for breach of contract, clearly avers that the “defendant breached the guarding service agreement ... in that the defendant failed and/or neglected to” perform in terms of the contract. There is no indication that the claim is based on any breach of contract by the guard.

So while confusion in the presentation of the plaintiff’s case could have contributed to the unfortunate outcome, it is also clear that the court was blind-sided by the fact that “(as to both the contractual claim and the delictual claim) [the pleadings relied] upon the same allegations. ... [that were] frequently repetitive ...” (par 45).

It is also unfortunate that the disregard for the doctrine of privity of contract did not end in the high court. On appeal the majority, per Mhlantla JA, summarised the

“issues [that] arise for consideration by this court. ... The second is whether the first respondent [Loureiro] was the party that concluded the agreement for guarding services with the appellant [iMvula]. The third is whether the appellant [iMvula] 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” (411C-E).

He then went on to hold that “no blameworthy conduct on the part of the guard had been proved. In the result, the first respondent [Loureiro] failed to prove the alleged breach of the contractual term” (417I).

Surely, if Mhlantla JA concluded (413E) that the contract was between Loureiro and iMvula, only Loureiro and iMvula could commit breach of that contract. The guard, not being privy to the contract between Loureiro and iMvula, could not, irrespective of his conduct during the night in question, commit a breach of the contract between Loureiro and iMvula. There was no contractual relationship

between the guard and Loureiro and therefore no grounds on which the guard could commit breach of contract towards Loureiro.

At first glance Cloete JA, in handing down his minority judgment, seemed to have appreciated privity of contract and apparently dealt with the claim for breach of contract separately from the claims in delict. He concluded (420D) that iMvula contracted with Loureiro and explained (423C) that 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”. However, this is a false glimmer of hope, as Cloete JA also concluded that 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” (421I). (As will become apparent below, when Cloete JA held that the reasonableness of the guard’s actions was irrelevant to the claim in contract, he was probably referring to the question whether fault (negligence) is a requirement for breach of contract. He clearly did not have privity of contract in mind.)

Again, it must be stressed that there was no contractual relationship between the guard and Loureiro, consequently no privity of contract between Loureiro and the guard and therefore no grounds on which the guard could commit breach of contract towards Loureiro.

In addition, Cloete JA concluded that the “first respondent therefore has an action in contract against the appellant [iMvula] for patrimonial loss suffered by himself, his wife and their children in consequence of a breach of contract” (420D).

But if the contract was concluded between iMvula and Loureiro, iMvula would only be liable for breach of contract, and consequently any damages resulting from breach of contract, towards Loureiro. There would be no basis in contract to claim any patrimonial damages suffered by the wife and children as a result of any breach by iMvula, because the wife and children were not privity to the contract.

Because the courts confused the claim in delict and the claim for breach of contract, too much emphasis was placed on the conduct of the guard during the night in question. The courts should simply have focused on the contractual relationship which both courts had found to exist between iMvula and Loureiro.

This is exactly what the constitutional court did. Van der Westhuizen J reaffirmed the age-old principle that “contractual obligations are determined by the intention of the parties” (par 43) and determined in respect of the claim for breach of contract that

“three issues must be decided: first, whether Mr Loureiro’s express prohibition against opening the pedestrian gate without prior authorisation amended the terms of the contract; second, whether this prohibition should be interpreted as imposing strict liability or instead as including a reasonableness qualifier; and third, whether the contract was breached” (par 40).

While he took the conduct of the guard on the night in question into account, there is never any suggestion that he considered it incumbent upon the security guard to meet the terms of the contract, nor that the guard committed any breach of contract. The conduct of the guard was but one factor which he considered to “determine whether iMvula is liable to Mr Loureiro” (par 40) before concluding that “iMvula is liable” (par 46). By focusing his attention to where privity of contract lay in this case, Van der Westhuizen J had no difficulty in determining that, in so far as the claim for breach of contract is concerned, the issue was the liability of iMvula towards Loureiro and only the liability of iMvula towards Loureiro.

Because the court of first instance and the supreme court of appeal confused the claim in delict and the claim for breach of contract, too much emphasis was

placed on the conduct of the guard during the night in question. The courts should simply have focused on the contractual relationship which both courts found to exist between the appellant and the first respondent. In so far as the claim for breach of contract is concerned, the questions should simply have been: What obligations did the contract impose on the appellant; did the appellant fulfil these obligations; and if the appellant did not fulfil these obligations, was the non-fulfilment of the obligations the cause of the damage suffered by the first respondent? At most, the conduct of the guard on the night in question should have been considered by the courts in determining whether the appellant had fulfilled its obligations in terms of its contract with the first respondent.

On the facts of the case, it is clear that the appellant agreed to provide “armed grade D security officers” to the first respondent at his house (the *a quo* case par 37 and the appeal court’s decision 413B *et seq*). In addition, the first respondent argued that he had given clear instructions that the pedestrian gate could only be unlocked and used for shift changes and no other reason whatsoever. The first respondent further argued that these instructions constituted an oral amendment to the contract between the appellant and the first respondent (the *a quo* case par 35). This was apparently accepted in the court of first instance (par 48) and by both the majority and minority in the supreme court of appeal (413F *et seq*, 422B *et seq*).

The crucial questions should then have been: On the night in question, did the appellants provide an armed grade D security officer to the first respondent at his house? And did the appellants ensure that the pedestrian gate was unlocked and used for shift changes only? The court of first instance and the supreme court of appeal failed to see this, but the constitutional court made this the focus of its enquiry into the claim for breach of contract (par 40).

In considering these questions, it is important to note, as Harms JA explained in *AA Alloy Foundry (Pty) Ltd v Titaco Projects (Pty) Ltd* (2000 1 SA 639 (SCA) 644G-H), that “the general principle is that contracts must be [performed] *in forma specifica* rather than by way of equivalents”. Performance in terms of a contract must therefore take place exactly as described in the contract (*Van Diggelen v De Bruin* 1954 1 SA 188 (SWA); *Hochmetals Africa (Pty) Ltd v Otavi Mining Co (Pty) Ltd* 1968 1 SA 571 (A)). Any performance which does not substantially comply with the description thereof contained in the contract or which is not reasonably suitable for the purpose described in the contract is not proper performance of the contract and constitutes breach (the *AA Alloy* case 644H).

Clearly, then, by providing an unarmed (albeit better qualified) grade A security guard and by not ensuring that the pedestrian gate was unlocked and used for shift changes only, the appellants committed multiple breaches of contract. And while Satchwell J concluded in the court of first instance that providing an armed guard would not have produced a different outcome (par 47), that breach should not be viewed in isolation, but together with the other breaches, such as the failure to ensure that the pedestrian gate was unlocked and used for shift changes only. And when one looks at the various breaches collectively, it is hard to deny that these breaches allowed the armed robbery and the eventual loss which the first respondent suffered.

As a result, one is compelled to agree with the assessment of Van der Westhuizen J in his finding that “iMvula is liable” (par 46). It is hard to see how the majority in the supreme court of appeal could have come to any other conclusion, unless they were swayed by factors other than the fundamental principles of the law of contract and the facts that clearly show a breach of that contract which led to the home invasion and robbery taking place and the subsequent loss suffered by Loureiro.



### 4.3 Vicarious liability

The emphasis which the court of first instance and the supreme court of appeal placed on the conduct of the guard in deciding the claim for breach of contract begs the question whether iMvula could have been liable towards Loureiro for breach of contract as a result of the conduct of the guard on the basis of vicarious liability.

However, in *Mutual Construction Co (Tvl) (Pty) Ltd v Komati Dam Joint Venture* (2009 1 SA 464 (SCA)) Leach AJA held that liability for breach of contract must be decided “with reference to the contract and not the principles of vicarious liability in delict” (468C). And in *Rofdo (Pty) Ltd t/a Castle Crane Hire v B & E Quarries (Pty) Ltd* Erasmus J explained that the

“principles involved ... relate to the question of vicarious liability towards third parties in delictual context. The present issue concerns respondent’s liability for a breach of contract. Accordingly, the question as to who was *inter partes* responsible for a particular act or omission ... must be considered within the framework of the agreement” (2002 1 SA 632 (E) 641G).

Consequently, vicarious liability applies to claims in delict, but not to claims for breach of contract. A party remains liable for breach of contract towards the other party on the basis of its own assumption of the duties imposed by the contract and on the basis of its own inability or failure to ensure that proper performance takes place in terms of the contract.

### 4.4 Breach of contract and fault

The unfortunate failure of the court of first instance and the supreme court of appeal to distinguish clearly between the claims in delict and the claim for breach of contract also resulted in delictual principles being applied to the claim for breach of contract. From the outset Satchwell J proceeded from the premise that “the liability of defendant (whether on claim A in contract or claim B in delict) essentially boils down to the question of negligence” (par 43). And on appeal the majority per Mhlantla JA concluded that Loureiro’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” (414C-D).

This implies that fault is a requirement for breach of contract. But in *Administrator, Natal v Edouard Van Heerden* JA cautioned: “*Ex delicto* such damages may only be claimed if the tortfeasor acted intentionally or negligently. By contrast, fault is not a requirement for a claim for damages based upon a breach of contract” (1990 3 SA 581 (A) 597E). And in *Thoroughbred Breeders’ Association v Price Waterhouse Marais* JA explained: “If it be suggested that fault is always involved in a breach of contract ... the suggestion would be wrong. Contracts may be breached in circumstances where no fault can be identified” (2001 4 SA 551 (SCA) 600C). (See also *Scoin Trading (Pty) Ltd v Bernstein NO* 2011 2 SA 118 (SCA) 122H; *Mokala Beleggings v Minister of Rural Development and Land Reform* 2012 4 SA 22 (SCA) 26E.)

As Cloete JA in the minority judgment in the supreme court of appeal therefore correctly indicates, 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” (423C). And in the constitutional court Van der Westhuizen J confirmed that “[i]n the absence of a contrary stipulation, the law of contract does not require fault (even in the form of negligence) for breach” (par 42).

There is one aspect of his judgment in this regard which begs further discussion, though. iMvula argued that its duties in terms of the contract were subject to the standard of reasonableness, since some of the clauses of the contract required

iMvula to take “all reasonable steps” to safeguard the house (par 44 n 40). Van der Westhuizen J held that the express reference to reasonableness in some clauses did not “impose the same fault standard” in respect of all obligations in terms of the contract (par 44). However, one can question whether the reference to “reasonable steps” in some clauses in fact introduced a fault standard and excluded strict liability for breach of those clauses. In *First National Bank of SA Ltd v Rosenblum Marais JA* explained that

“[i]n matters of contract the parties are taken to have intended their legal rights and obligations to be governed by the common law unless they have plainly and unambiguously indicated the contrary. Where one of the parties wishes to be absolved either wholly or partially from an obligation or liability which would or could arise at common law under a contract of the kind which the parties intend to conclude, it is for that party to ensure that the extent to which he, she or it is to be absolved is plainly spelt out” (2001 4 SA 189 (SCA) 195G-H).

This means that a contract should not be interpreted to deviate from existing common law principles “if there is another realistic and not fanciful basis of potential liability to which the clause could apply” (195I) in accordance with the common law. Since common law imposes strict liability for breach of contract, one could question whether the reference to “reasonable steps” in some clauses of the contract actually introduced fault as a requirement for the breach of those clauses.

There is an alternative interpretation: the reference to “reasonable steps” could be interpreted as referring to the nature, scope and extent of the steps that should be taken – it defines the obligation imposed in terms of the contract in much the same way as reference to a “reasonable price” would tend to quantify the amount payable (and therefore define the duty to pay). If a party is therefore required to take “reasonable steps” to protect a client from crime, such a clause merely defines the content of the obligation. It does not relate to the blameworthiness of a party who fails to take the “reasonable steps” and therefore does not introduce fault as a requirement for breach of such a clause. If a party fails to take reasonable steps, it would then be irrelevant whether that party was negligent in failing to provide such reasonable steps. In other words, the reference to reasonable steps merely indicates that there is an obligation on a party to do X, Y and Z – it does not deal with a failure to do X, Y and Z and therefore does not impose fault as a requirement for breach of the obligation to provide X, Y and Z. For instance, if it is determined that “reasonable steps” would include that a guard should be able to communicate with a control room by radio, “reasonable steps” merely defines the obligation as including the provision of radio communication between the guard and the control room. It does not address the failure to ensure such communication. Therefore a party would still be in breach where a guard was unable to use the radio because a short circuit or power failure rendered the radio inoperative or interference from a cell phone tower produced so much static that communication by radio could not take place, even though one cannot say that there was any negligence in these failures. Such an interpretation is entirely plausible and would be in accordance with the common law principle of strict liability for breach of contract.

## 5 Conclusion

When those who are appointed and contracted to protect us neglect their duties or fail to provide the necessary protection, the consequences can be catastrophic for those who find themselves in peril. Life, limb, sanity and property can be at stake. Similarly, when those who are sworn to uphold the laws of the country completely

disregard some of the most fundamental principles of the law of contract, the consequences for those who rely on the sanctity of contracts to conduct their day to day business can be equally catastrophic. Far from providing clarity on the question of contractual liability where a security service provider had apparently failed to protect its client, the judgments in the *Loureiro* case both in the court *a quo* and the supreme court of appeal have muddied the water. It is unfortunate that the courts got caught up in the facts that appeared identical for the various claims and failed to recognise that the case involved different claims that were fundamentally different – a claim for breach of contract on the one hand, and claims in delict on the other. As a result the two distinct causes of action were confused and delictual principles were applied in deciding the contractual claim. At least in so far as the claim for breach of contract is concerned, what should have been a simple question of whether a party to a contract had failed to fulfil its obligations and had thereby caused loss to the other party became an in-depth analysis of the conduct of a third party who was not privy to the contract.

In the end, the constitutional court, as the guardian of human rights, also turned out to be the guardian of the law of contract and effectively the guardian of the guardians. By allowing the appeal from the supreme court of appeal the constitutional court kept a watchful eye on the supreme court of appeal to ensure that the law was applied correctly and fairly and that no ulterior factors influenced the outcome of the case. By recognising that the case involved different claims that were fundamentally different and dealing with the various claims as distinct actions, the constitutional court did not get caught up in the facts that appeared identical for the various claims, but stayed true to the fundamental principles of the law of contract. In the end, the constitutional court provided much-needed clarity on the question of contractual liability where a security service provider fails to protect its client and prevented a flawed judgment of the supreme court of appeal from setting some dangerous precedents. And because of that, we can all sleep a little better at night.

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