THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case no**:** 132/09

In the matter between:

VIV'S TIPPERS (EDMS) BPK **Appellant**

and

PHA PHAMA STAFF SERVICES (EDMS) BPK
h/a PHA PHAMA SECURITY **Respondent**

Neutral citation: **Viv's Tippers v Pha Phama Staff Services (132/09) [2010] ZASCA 26 (25 March 2010)**

Coram: Lewis, Van Heerden, Cachalia and Tshiqi JJA and Theron AJA

Heard: **08 March 2010**

Delivered **25 March 2010**

Summary: Wrongfulness of conduct of security guard in allowing unauthorized removal of truck from site where security provider had contract with owner of site to protect it, but where contract excluded liability for provider's services – held security provider not liable – owed no duty to owner to prevent theft of its truck.

ORDER

On appeal from: North Gauteng High Court (Pretoria) (Du Plessis J sitting as court of first instance):

The appeal is dismissed with costs, including those of two counsel.

JUDGMENT

LEWIS JA (VAN HEERDEN, CACHALIA AND TSHIQI JJA and THERON AJA concurring)

[1] The primary issue in this appeal is whether the owner of a vehicle, stolen from premises protected by a guard employed by a security firm at the instance of the owner of the premises, has a claim in delict against the security firm for the loss, by theft, of its vehicle. In *Compass Motors Industries (Pty) Ltd v Callguard (Pty) Ltd*[1] the court said, obiter, that in principle such a claim was recognized. I shall deal more fully with this proposition later in the judgment. In *Longueira v Securitas of South Africa (Pty) Ltd*[2] the court found the security company liable in similar circumstances, but on the basis that the third party had relied on the existence of security provided by the owner of the premises protected. The statement by the court in *Compass Motors* and the decision in *Longueira* have been subjected to considerable criticism.[3] And the high court in this matter considered the statement of the general principle in *Compass Motors* to be incorrect. This court is thus called upon to deal with the issue directly.

The facts

[2] But first, the facts. The appellant, Viv's Tippers (Edms) Bpk (Viv's Tippers) lets trucks to construction firms. In September 2004 it let several

[1] 1990 (2) SA 520 (W) at 529G-J.
[2] 1998 (4) SA 258 (W) at 263E-F.
[3] See, for example, J Neethling, J M Potgieter and P J Visser *Law of Delict* 5 ed pp 64-65 and the comments referred to there.

trucks to Lone Rock Construction (Pty) Ltd (Lone Rock) which was carrying out construction works on a site at Kibler Park, Johannesburg. The site was guarded by security guards employed by the respondent, Pha Phama Staff Services (Edms) Bpk h/a Pha Phama Security (Pha Phama) in terms of a contract between Lone Rock and Pha Phama. Viv's Tippers was aware of the security provided. The evidence of Mr Viviers, a director of Viv's Tippers, was that it was a term of its contract with Lone Rock that the site should be secured.

[3] There was a long weekend from 23 to 26 September 2004. A Mercedes Benz truck, belonging to Viv's Tippers, was parked on the site, which was enclosed, and which could be entered only through a locked gate. A security guard employed by Pha Phama was on duty. Two men arrived at the site on Sunday 26 September and presented a letter to the guard, purporting to be from a firm of truck repairers. I shall deal with the terms of the letter more fully when dealing with the question whether the security guard acted negligently. In essence it stated that mechanics would be sent to the site on that date to repair the diesel pump of the truck in question, for which the vehicle registration number was given. The letter also stated that while the truck would be fixed on site, the mechanics would test drive it. The guard allowed the men to drive the truck away from the site – and it was never seen again.

[4] Viv's Tippers instituted an action in delict against Pha Phama claiming the value of the truck (which was agreed), contending that as owner of the stolen truck it had suffered loss as a result of the theft; that Pha Phama was vicariously liable for the conduct of the security guard; and that Pha Phama owed it a legal duty, rendering it liable for the loss. Pha Phama denied liability on the basis that it had no legal duty and that even if it did have, the guard was not negligent. Du Plessis J dismissed the claim finding that there was no legal duty and that the guard had not been negligent. The appeal to this court is with his leave.

Wrongfulness

[5] The first question before us is therefore whether the security guard's conduct in allowing the two men to drive the truck away from the site was wrongful (or, to use a synomym, unlawful), rendering Pha Phama vicariously liable. It is not disputed that the guard's conduct constituted a positive act. The question does not relate, therefore, to a wrongful omission. But the loss suffered is purely economic: so the law does not without more impose a legal duty on the guard to prevent loss. In *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA*[4] Harms JA said that pure economic loss 'connotes loss that does not arise directly from damage to the plaintiff's person or property but rather in consequence of the negligent act itself, such as a loss of profit, being put to extra expenses or the diminution in value of the property'. The loss, through theft, of property, would also fall in this class.

Economic loss

[6] Where loss sustained is purely economic the question must be asked whether public policy, or the convictions of the community, require that there should be such a duty.[5] That an action does lie for pure economic loss, provided that public policy requires that it should, is now settled law. It is not necessary to enumerate the authorities. However, courts have been circumspect in allowing a remedy because of the possibility of unlimited liability: the economic consequences of an act may far exceed its physical effect. There is a spectre of limitless liability.[6] It is established thus that a court, in deciding to impose liability on an actor, must consider whether it is legally and socially desirable to do so, having regard to all relevant policy considerations, including whether the loss is finite and whether the number of potential plaintiffs is limited.[7] Where the success of an action could invite a multitude of claims, sometimes for incalculable losses, an action will generally

[4] 2006 (1) SA 461 (SCA) para 1.
[5] See in this regard *Aucamp & others v University of Stellenbosch & others* 2002 (4) SA 544 (C) and the authorities cited in paras 63-68; *Telematrix (Pty) Ltd t/a Matrix Vehicle Trading v Advertising Standards Authority SA* above and *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA); (653/07) [2008] ZASCA 131.
[6] See *Ultramares v Touche* (1931) 255 NY 170, considered in *Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465 (HL).
[7] P Q R Boberg *The Law of Delict* (1984) p 104ff.

be denied.[8] But in each case the imposition of liability must turn on whether, in the circumstances, liability should be imposed. That will in turn depend on public or legal policy, consistent with constitutional norms: *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd*.[9] To ensure that the question of legal or public policy is not determined arbitrarily, or unpredictably, a court is not required to react intuitively, but to have regard to the norms of society that are identifiable: *Minister of Safety and Security v Van Duivenboden*[10] and *Fourway Haulage.*[11]

Economic loss in a contractual setting

[7] Where economic loss arises from a breach of contract, loss will of course be limited. But a negligent breach of contract will not necessarily give rise to delictual liability. This court has held that where there is a concurrent action in contract an action in delict may be precluded: *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) (Pty) Ltd*.[12] But that case held only that no claim is maintainable in delict when the negligence relied on consists solely in the breach of the contract. Where the claim exists independently of the contract (but would not exist but for the existence of the contract) a delictual claim for economic loss may certainly lie. This is made clear by *Bayer South Africa (Pty) Ltd v Frost* [13] and *Holtzhauzen v Absa Bank Ltd*.[14]

[8] Accordingly it is possible that the assumption of contractual duties is capable of giving rise to delictual liability. The question is whether there are considerations of public or legal policy that require the imposition of liability to cover pure economic loss in the particular case.[15]

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[8] Op cit p 105, citing *Shell & BP South African Petroleum Refineries (Pty) Ltd v Osborne Panama SA* 1980 (3) SA 653 (D) and *Franschoekse Wynkelder (Ko-Operatief) Bpk v SAR & H* 1981 (3) SA 36 (C).
[9] 2009 (2) SA 150.
[10] 2002 (6) SA 431 (SCA) para 21.
[11] Above para 22.
[12] 1985 (1) SA 475 (A). Contrast the decision of the court below in *Pilkington Brothers (SA) (Pty) Ltd v Lillicrap, Wassenaar and Partners* 1983 (2) SA 157 (W).
[13] 1991 (4) SA 559 (A).
[14] 2008 (5) SA 630 (SCA); (280/03) [2004] ZASCA 79.
[15] See *Trustees, Two Oceans Acquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 12; *Chartaprops 16 (Pty) Ltd & another v Silberman* 2009 (1) SA 265 (SCA); (300/07) [2008] ZASCA 115 para 22 (the passage is in the dissenting judgment of Nugent JA but is not in conflict with the ratio of the majority judgment); and *Aucamp v University of Stellenbosch* above.

Public or legal policy on imposing liability

[9] Viv's Tippers argued that liability should be imposed on Pha Phama. It relied, of course, on the statement in *Compass Motors* to which I have referred. In that case Callguard had undertaken to Imperial Motors to provide security guards at its premises at night. According to the contract between the parties the only function of the security service provided was to minimize the risk of loss through theft or vandalism. Callguard expressly did not guarantee that they would succeed in this endeavour, and also excluded liability to Imperial Motors or any third party for loss or damage arising out of the conduct of its staff, including negligent conduct or omissions.

[10] Vehicles belonging to Compass Motors, lawfully parked at the Imperial Motors premises, were stolen one night. In an action in delict for damages caused by the omission by the guards to protect the premises, Van Zyl J regarded the contract between Imperial Motors and Callguard as irrelevant. The learned judge said:[16]

'When considerations of public policy and its concomitants, justice, equity and reasonableness, are applied to the facts and circumstances of the present case, I believe that both these questions [whether a legal duty was owed by the security firm to the entity whose vehicles were stolen, and whether that liability should be restricted] should be answered in the negative. *The contractual restriction or limitation of liability is, in my view, totally irrelevant for purposes of establishing the delictual liability of one or both contracting parties in respect of a third person who suffers injury arising from an act or omission pursuant to the contract in question* [my emphasis]. The community's sense of justice, equity and reasonableness will undoubtedly be offended by strictures placed on delictual liability towards third persons, simply because the contract limits the contractual liability of the parties *inter se*.

The same applies to the nature and ambit of contractual obligations stipulated in a contract, particularly in a case such as the present, in which the contractual liability of the defendant has been considerably curtailed. It is conceivable that the security procedures required of the defendant may be hopelessly inadequate for purposes of protecting the property of third persons located on the premises. Should

[16] Above at 529H-530F.

such persons be aware of the presence of a security system on the premises, they may be lulled into a false sense of security in deciding to leave their property on such premises. They are in fact relying on the presence of the security guards and they may justifiably entertain the expectation that reasonable steps will be taken to protect their property. According to the American *Restatement of the Law* 2d: Torts S 324A . . . this is one of the grounds on which a contracting party may, in American law, incur liability to a third person for the "negligent performance of undertaking", namely if "the harm is suffered because of reliance of the other or the third person upon the undertaking". I would be reluctant, however, to restrict liability to cases where the third party is aware of the existence of security procedures. In the times in which we live it is not unjustifiable to presume that most businesses of any repute would employ some form of security procedure for their own benefit and for that of their clients. Most clients would be aware of this and it should not be necessary to introduce the fact of their awareness as a prerequisite for liability. The case may be different where the clients are aware of the inadequacy of the security arrangements and nevertheless elect to entrust their property to unreliable guardians. For present purposes, however, it is not necessary to suggest how this may affect liability.'

[11] This passage, as I have said, is obiter, for the court found that the security guard was not negligent. In *Longueira*,[17] however, the security service was found liable, the court holding that the terms of the contract between the owner of the premises and the security service were not relevant. The fundamental difficulty that I have with this approach is that it does not explain why the liability of the security company to third parties should be more extensive than it is in contract with the party which hired it to provide security services in the first place. For almost invariably, as in this case, the security company will have excluded liability for loss or damage to premises or property which it has been engaged to protect. How can the contractual arrangement between the owner of the premises and the security provider be irrelevant to the question whether a duty should be imposed on the security provider to third parties whose property is stolen? And does the mere fact that the person who engaged the security services, on the assumption that there is no exclusion of liability and there would be a claim in contract, mean that a third party should have the same protection?

[17] Above at 263H-J.

[12] Counsel for Viv's Tippers did not explain why the third party should be better off than, or even in the same position as, the other party to the contract. The propositions advanced in this regard were that Pha Phama was in control of the premises and the truck on the relevant day; that the foreman of the site (Mr Beukes) was contactable by telephone and that the guard should have confirmed with him whether the truck should be removed; and that the site was in a high risk area with a high level of crime. None of these factors, in my view, is relevant to whether the guard's conduct was wrongful. They are all factors that must be taken into account in determining whether the guard was negligent – whether he should have foreseen the possibility of harm and taken steps to guard against it.

Relevance of terms of the contract

[13] The question whether Viv's Tippers should have a claim – the question as to wrongfulness – must be determined by whether public policy dictates that a claim should be afforded to a third party where the owner of premises who has arranged for security, and pays for it, is denied one. Pha Phama would not have been guarding the premises but for its contract with Lone Rock. The terms of that contract must, in my view, play a role in assessing what the convictions of the community would be in relation to affording a claim for compensation to a non-contracting party.[18]

[14] The relevant clauses in the contract are as follows:

'4. The Contractor [Viv's Tippers] shall by its services endeavour to prevent or minimise possible damages occasioned by theft, burglary, or illegal disturbance to the best of its ability. This is not to be construed as a warranty that such damages will be prevented or minimised and no guarantee is given in this regard. The Client [Lone Rock] must not assume these services to be an alternative to insurance and hereby agrees that the Contractor cannot be held liable for any damage or loss incurred.

5. The Client hereby indemnifies the Contractor against any claims from loss or damage or any other claim which may arise out of the provision of the Contractor's services in terms of this agreement.'

[18] This was the conclusion of Du Plessis J in the high court too.

[15] Viv's Tippers argued first that the exclusion of liability agreed to by Lone Rock does not affect the obligation imposed on Pha Phama to compensate it for the loss of the truck. I have already expressed doubt about the soundness of that proposition and shall return to it. It contended, secondly, that the clauses as phrased do not exclude liability on the part of Pha Phama for negligent conduct, even to Lone Rock. Negligence is not mentioned in terms. Viv's Tippers relies in this regard on *Galloon v Modern Burglar Alarms (Pty) Ltd*[19] in which it was held that an exclusion clause in a contract that did not in express terms exempt a contracting party from liability for negligence, and could be interpreted to cover another cause of action, was not effective to exclude liability for negligent conduct.

[16] In my view *Galloon* is not helpful. First, it was dependent on the very specific wording of the contract. And secondly, subsequent cases in this court have held quite the contrary. Dealing with the proper approach to the interpretation of indemnity clauses, this court said in *Durban's Water Wonderland (Pty) Ltd v Botha & another*:[20]

'The correct approach is well established. If the language of the disclaimer or exemption clause is such that it exempts the *proferens* from liability in express and unambiguous terms, effect must be given to that meaning. If there is ambiguity, the language must be construed against the *proferens*. (See *Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd* 1978 (2) SA 794 (A) at 804C.) But the alternative meaning upon which reliance is placed to demonstrate the ambiguity must be one to which the language is fairly susceptible; it must not be "fanciful" or "remote" (cf *Canada Steamship lines Ltd v Regem* [1952] 1 All ER 305 (PC) at 310C-D [1952 AC 192]).'

[17] See also *First National Bank of SA Ltd v Rosenblum & another,*[21] *Johannesburg Country Club v Stott,*[22] *Afrox Healthcare Bpk v Strydom*,[23] *Van*

[19] 1973 (3) SA 647 (C).
[20] 1999 (1) SA 982 (SCA) at 989G-J.
[21] 2001 (4) SA 189 (SCA).
[22] 2004 (5) SA 511 (SCA).
[23] 2002 (6) SA 21 (SCA).

der Westhuizen v Arnold[24] and *Redhouse v Walker*.[25] In *First National Bank*, where the defendant had raised an argument based on the *Galloon* reasoning Marais JA said the following:[26]

'Before turning to a consideration of the term here in question [an exclusion clause disclaiming liability on the part of the bank for liability for any loss or damage], the traditional approach to problems of this kind needs to be borne in mind. It amounts to this: In 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. This strictness in approach is exemplified by the cases in which liability for negligence is under consideration. Thus, even where an exclusionary clause is couched in language sufficiently wide to be capable of excluding liability for a negligent failure to fulfil a contractual obligation or for a negligent act or omission, it will not be regarded as doing so if there is another realistic *and not fanciful basis of potential liability* to which the clause could apply and so have a field of meaningful application. (See *SAR & H v Lyle Shipping Co Ltd* 1958 (3) SA 416 (A) at 419D–E) [my emphasis].

It is perhaps necessary to emphasize that the task is one of interpretation of the particular clause and that *caveats* regarding the approach to the task are only points of departure. In the end the answer must be found in the language of the clause read in the context of the agreement as a whole in its commercial setting and against the background of the common law and, now, with due regard to any possible constitutional implication.'

[18] The exclusion clause in this case is not ambiguous. It says clearly that Pha Phama gives no guarantee; that the contract is not an alternative to insurance; and that it is not liable to Lone Rock for any damage or loss incurred. Clause 5 makes it even plainer: Lone Rock indemnifies Pha Phama against any claim arising out of the provision of its services, including negligent conduct. But the argument in any event assumes that a valid claim exists, and that begs the question whether Viv's Tippers has a claim at all.

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[24] 2002 (6) SA 453 (SCA) paras 13 and 23.
[25] 2007 (3) SA 514 (SCA).
[26] Paras 6 and 7.

[19] That brings me back to the first issue – wrongfulness. Pha Phama argued that there is no evidence that it was informed it was responsible to third parties whose vehicles were parked on the site. Had Pha Phama known that it was required to take on additional responsibilities it may have contracted with Lone Rock on different terms – at a higher cost at least. Why should Pha Phama, where it has regulated its liability to Lone Rock, be exposed to the problem of indeterminate claims to unknown plaintiffs? The argument is based on the very reason for circumspection in respect of claims for economic loss: unlimited liability to unknown plaintiffs.

[20] In commenting on the problems arising from the general principle expressed in *Compass Motors* Professors Dale Hutchison and Belinda van Heerden wrote:[27]

'Here [where a breach of contract causes loss not to a contracting party but within a contractual matrix, as in *Compass Motors*] there is no privity of contract between the plaintiff and the defendant, but each is linked by way of contracts to a middle party and there is a clear tripartite understanding of where the risk is to lie . . . . In such a situation there is little danger of indeterminate liability . . . .

Even though, *ex hypothesi*, the plaintiff here has no contractual remedy against the defendant, all the parties to the arrangement knew exactly where the respective risks lay. Therefore, each party, with full knowledge of his risk exposure, could reasonably have been expected to have protected himself by other means (for example, through contractual arrangements with other parties or by taking out appropriate insurance).This of course also brings the anti-circumvention argument strongly to the fore: *to superimpose on the consensual arrangements a delictual duty of care would disturb the balance, by allowing a shifting of losses within the matrix contrary to the original understanding of the parties.* Unlike the concurrence situation [as was the case in *Lillicrap* above], it cannot here be argued that the scope of a delictual duty would necessarily be circumscribed by the specific provisions of a contract between plaintiff and defendant – in this type of case there is no direct contractual link between them' (my emphasis).

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[27] 'The tort/contract divide seen from the South African perspective' 1997 *Acta Juridica* 97 p114.

The consideration of policy and norms

[21] There are thus a number of reasons for concluding that the security guard's conduct in allowing the men to remove the truck from the site was not wrongful. The primary reason is the contract itself, but for which there would have been no security provided at the site, and which precludes a claim by Lone Rock, the other contractant, which paid for the services. The undertaking given by Pha Phama that it would prevent damage or loss to the best of its ability, but that it gave no guarantees, would be completely undermined if a claim against it by third parties were allowed. Community convictions would not, in my view, permit the undermining of the contract in such a way.

[22] In argument during the hearing of the appeal counsel were asked to consider the significance of the most recent decision dealing with a claim in delict by a person against a party to a contract with another: *Chartaprops 16 (Pty) Ltd v Silberman*.[28] There the claim was for damages for physical injury caused by the omission of a cleaning service to mop up a spillage of liquid on the floor of a shopping mall (there was no evidence as to who had caused the spillage) which had resulted in Mrs Silberman falling and injuring herself. The cleaning service had entered into a contract with Chartaprops, the owner of the mall, in terms of which it was obliged to clean the floors in accordance with an agreed procedure.

[23] The majority of the court found that the cleaning service was liable for the damages. Nugent JA dissented, concluding that it was Chartaprops that was negligently in breach of a duty. For the purpose of this judgment nothing turns on the difference in their respective approaches. And of course the questions in that case were who was liable for the physical injury, and whether there was liability for a negligent omission, whereas in this case we are concerned with whether there should be liability for economic loss in a contractual matrix, but not pursuant to a contract.

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[28] 2009 (1) SA 265 (SCA); (300/07) [2008] ZASCA 115, referred to above. And see also *Pienaar & others v Brown & others* (48/2009) [2009] ZASCA 165 (1 December 2009) where a building contractor was found to be negligent, but the owner of a house was held not liable where a balcony, negligently constructed, collapsed, resulting in injury to guests who had been standing on the balcony.

[24] The debate centred on a passage in the majority judgment where Ponnan JA said:[29]

'Neither the terms of Advanced Cleaning's engagement, nor the terms of its contract with Chartaprops, can operate to discharge it from a legal duty to persons who are strangers to those contracts. Nor can they directly determine what it must do to satisfy its duty to such persons. That duty is cast upon it by law, not because it made a contract, but because it entered upon the work. Nevertheless its contract with the building owner is not an irrelevant circumstance, for it determines the task entered upon.'

[25] It was submitted, rather faintly, that the first sentence of the paragraph means that the terms of the contract between the contracting parties can have no bearing on the claim of the third party victim. If that is a correct reading of the proposition, then it is not consonant with our law. But as counsel for Pha Phama submitted, the balance of the passage indicates the contrary: the terms are not irrelevant, for they determine what the 'task entered upon' is. In this case, the task entered upon by Pha Phama was to secure the site but not to guarantee success. The passage, in my view, is not inconsistent with the conclusion that the contract must have a bearing on the claim of the third party victim.

[26] As to other considerations of public policy, if one were to recognize the general principle that was expressed in *Compass Motors*, security services for particular premises might become unattainable. The spectre of limitless liability to a multitude of unknown plaintiffs should preclude such a claim. One has only to imagine a motor garage where many expensive vehicles are parked and where there is no contractual privity between the security company or the owner of the premises. Liability could be endless.

[27] Accordingly I conclude that the conduct of the guard was not wrongful and that Pha Phama was not vicariously liable for the loss occasioned by the theft of the vehicle. It is therefore not necessary to consider whether the guard

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[29] Para 47.

was negligent. But I shall do so briefly because the high court found that he was not and Viv's Tippers argued strenuously that the guard was negligent.

Negligence

[28] The evidence on negligence was sparse. The guard was not called to testify. Mr Beukes, the Lone Rock foreman in charge of the site, testified that he was contactable by the security guard on duty, and said that it would have been agreed that in the event of a problem the guard should contact him. He was not in fact telephoned when the two men approached the guard on the Sunday afternoon and presented him with the letter in question. He said also, however, that repairs were regularly done on the site over a weekend, but he would usually be informed in advance when this was proposed. There was no evidence that the security guard on duty was aware of this procedure.

[29] The driver of the truck also gave evidence and said that when he had left the site before the weekend he had taken the key of the truck with him and had left it at the premises of Viv's Tippers. When he returned to the site after the weekend the truck was no longer there.

[30] Viv's Tippers argued that the guard's negligence lay in not having questioned the authenticity of the letter presented by the two men who arrived claiming that they had been sent to repair the truck. It is true that the letter was questionable: it was confused and confusing. It was on a letterhead of an entity referred to as 'Denver Truck Repaires (sic) and Spares Providers'. Addresses and telephone numbers were set out. It was not addressed to Lone Rock or to Pha Phama, but was signed by a Mr Pretorius who was stated to be the manager. It was dated 23 September 2004 – the Friday of the long weekend. The letter read:

'Dear Sir

We will be sending our mechanics on Sunday 26th of September 2004, to look at one of your Mercedes Benz truck that had a problem on Thursday afternoon.

We will send to [sic] guys to look at your diesel pump, then they will fix it on sight [sic] and test drive the truck to make sure it is fine. The security will be informed on sight [sic] then asked to sign this document for us.

The registration of this said truck is FBX 943 N.
All this will take place at your site in Kibler Park.
We trust that everything is in order.
Regards
(signed)

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V Pretorius (Mnr) (Manager)

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Security'

[31] Viv's Tippers contended that the contents of the letter should have alerted the guard to something untoward. It is not literate, and while it says all work will be done on site, it also states that the vehicle would be test-driven. That could not be done on site. The guard, it argued, should have realized that the letter was not authentic and should have foreseen the possibility of theft and taken steps to guard against it.

[32] Du Plessis J in the high court found that there was simply not enough evidence on which to make a finding as to negligence and that the onus of proving negligence was not discharged by Viv's Tippers. I agree with that conclusion. There was nothing to suggest that the guard was literate or educated. He was faced with a letter referring expressly to a Mercedes Benz truck with a particular registration number. In the absence of evidence as to how a reasonable person in his position would have acted, no finding as to negligence can be made.

[33] The appeal is dismissed with costs, including those of two counsel.

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C H Lewis

Judge of Appeal

APPEARANCES

APPELLANTS:	J H L Scheepers Instructed by André Grobler Attorneys, Pretoria; Symington & De Kok, Bloemfontein.
RESPONDENTS:	N van der Walt SC (with him L Malan) Instructed by Hunts (Ing Borkums) Attorneys c/a Rooth Wessels, Pretoria; McIntyre & Van der Post, Bloemfontein.