

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG**

(1) REPORTABLE: **NO**

(2) OF INTEREST TO OTHER JUDGES: **NO**

04/02/2019

DATE

SIGNATURE

Case Number: **15737/2015**

In the matter between:

NARAYAN TEXTILES CC

Plaintiff

And

FOX ALARMS AND SECURIRY

Defendant

JUDGMENT

FISHER J,

INTRODUCTION

[1] This action is founded in contract. It involves a determination of the contractual obligations of the defendant, which I shall call Fox, to the plaintiff, which I shall call Narayan and a decision as to whether any term of the contract has been breached by Fox. The plaintiff sues for damages flowing from the loss of its stock in a burglary to its business premises.

[2] Fox is a company which provides security services to the public. Narayan, represented by its managing member, Mr Fulesh Bilakhia, contracted with Fox, represented by its sales representative, Mr Gerard Smit to supply security services to Narayan in the form of an alarm system which was linked to an armed response facility.

[3] In essence, the question to be determined is what the obligations of Fox under the contract were and specifically whether Fox is liable under circumstances where the alarm was operational but a signal was not received by the control office to signify intrusion.

[4] There is substantial agreement as to the terms of the contract. This is notwithstanding that the contract, for the most part, is based on oral agreement.

[5] Plaintiff bears the onus of establishing that there was a breach of the contract.

FACTS

[6] The business of Narayan is the wholesale of imported dish cloths and other cotton and microfiber cloths under the brand name "*Dream*". The business hours of Narayan are from Monday to Friday from 08: 30 to 17: 30. At the time in question it employed 10 people. The burgled premises was used by Narayan as an office and warehouse. The contract was concluded at the premises on 12 September 2011. At the time the plaintiff was in the process of relocating to the premises and had only recently taken occupation thereof.

[7] Mr Smit attended at the premises pursuant to an enquiry by Mr Bilakhia for security services. The contract relied on is alleged to be partly written and partly oral.

The written portion of the contract is no more than a rudimentary quotation setting out equipment to be supplied and work to be done and the cost thereof. It is common cause that this quotation was accepted by Mr Bilakhia and that in addition certain oral terms were agreed to in relation to the installation and operation of the alarm system.

[8] The quotation provided for the removal of a control unit and transformer from the previous premises of Narayan and the reinstallation of this control unit and transformer which I shall refer to collectively as "the control box" in the premises in issue. In addition, Fox installed a radio transmitter and antenna at the premises for the purpose of communicating with the Fox control room.

[9] It was the evidence of Mr Smit that on inspection of the premises he advised that, in addition to the existing infra-red detectors, commonly known as "passives" which were part of the old alarm system, 2 extra passives be supplied and installed. Other accessory items were supplied by Fox and installed and a monthly fee was agreed for the monitoring of the alarm and armed response.

[10] Further oral terms were as follows:

- a. Fox would make its control room, which was manned on a 24-hour basis 7 days a week, available to Narayan, thus ensuring that the premises were monitored at all times;
- b. All activations and de- activations or intruder alarms triggered by the alarm system would result in SMS notifications being sent to Mr Bilakhia by an automated electronic system overseen and administered by Fox;
- c. In the events of activation, de-activation or the intruder alarm being triggered, the control room would contact Mr Bilakhia telephonically in order to request instructions as to what action should be taken and would, in addition, deploy armed guards to the premises.

[11] The agreement fell within the purview of and was subject to the Private Security Industry Regulatory Act 56 of 2001 as well as the regulations and Code of Conduct issued in terms thereof.

[12] At the request of the parties, I attended an inspection of the premises at the commencement of the hearing. The various parts of the system were pointed out to me as was the part of the roof where access was gained by the robbers. In addition, I was furnished with photographs of the premises and the roof taken the day of the incident. These formed parts of a report conducted by investigators at the instance of Mr Bilakhia. The photographs were not in dispute.

[13] In his evidence, Mr Smit was candid about not having a very good memory of concluding the contract. He did recall, he said, that Mr Bilakhia was looking for a cost-effective option and that the installation was done on that basis. The Defendant contends that notwithstanding budgetary constraints, the system installed was adequate for Mr Bilakhia's

[14] The premises are situated in a walled business park, which has a guard office at the entrance/exit that is manned and controlled by security guards employed by, Danga Security Services. There are a number of business premises located within the business park. The guard office was equipped with a digital video recorder. In addition, Danga provided guards which patrolled the park.

[15] The premises of Narayan consist of a warehouse section and an office section. The warehouse section was fitted, at its main entrance, with a large roller shutter door to enable a vehicle to be driven into the warehouse and for loading and off-loading. Narayan used an open truck or "bakkie" for this purpose and the bakkie was generally left parked inside the warehouse overnight. This was the position on the night in question.

[16] The office section is accessed from the warehouse via a short passage which has a door leading thereto. The office is also accessed from the outside by a door. After inspecting the premises, Mr Smit recommended that the two extra passives (that is extra to the existing equipment to be moved from the previous premises) be installed. He also recommended that these passives be installed in the warehouse portion of the premises near the roller shutter door and in such a manner that they would allow for detection of any tampering with the control box, which was also positioned near the door. In addition, the roller shutter door was fitted with sensors

which were set to trigger activation of the system if the door was opened. All in all, there were 3 infra-red detection passives which served the warehouse and another 2 passives which served the office section of the premises. Mr Bilakhia agreed that there had been an inspection and that he had taken the advice of Mr Smit. He denied that he wanted a cheap option. He insisted that he merely wanted a system that would achieve his aim – being the protection of his premises from intrusion and the prevention of the loss of the goods stored therein.

[17] In the normal course of operation of the system, Mr Bilakhia activated the alarm system using a security keypad located in the office. The operation of the passives in the office was time delayed for some seconds to enable the arming of the alarm and exit from the office through the outer office door without setting off the alarm. Mr Bilakhia received all messages relating to the activation of the alarm and the deactivation thereof on his cell phone. On activation he would receive a message reading "*closed*" and on deactivation, a message reading "*open*".

[18] The system had an automatic remote testing facility which would ensure that it was active and connected to the control room.

[19] On the Friday evening of 8 August 2014, Mr Bilakhia, on leaving the office, activated the alarm system as usual and received the "*closed*" message on his cell phone. An activity report generated by the system revealed that the alarm was activated at 17:15 on that day. During the weekend he received no communications from Fox, as was the norm.

[20] At approximately 02:00 on Monday 11 August 2014 he received a telephone call from a supervisor employed by Danga, who informed him that there was a break-in at the premises. He immediately contacted Fox to report the break-in and to complain that he had not received any communication from Fox as to the triggering of the alarm.

[21] It transpired that a gang of robbers had allegedly held up and overpowered three security officers at the entrance to the office park and tied them up. They then proceeded to the premises of Narayan and accessed the warehouse section by making a hole in the roof.

[22] It is not clear what happened thereafter in relation to the activation of the alarm system as the control box was found to have been removed from the wall and taken by the robbers. The radio transmitter was also removed.

[23] The plaintiff called as an expert witness, Mr David Casey who is eminently qualified as an expert. Mr Casey testified that, had the control box been available, the processor therein would have allowed for a determination of what had occurred in relation to the alarm.

[24] What is clear is that, although the alarm system was operational, for some reason it did not send a signal to Fox's control room.

[25] Thus the parties were left to speculate as to the reason for the failure to send the signal.

[26] On behalf of Narayan, it was posited that the most likely reason was that the passives in the warehouse had not been programmed so as to create, what Mr Casey called, an "instant zone". He explained that particular areas or "zones" of premises can be programmed in such a way that the alarm is triggered instantly when detecting intrusion as opposed to zones which have a delay feature to allow for enough time for the enabling and disabling of the alarm and the exiting of the premises by the person setting the alarm – as was the case in relation to the office section of the premises. This failure to programme the warehouse as an instant zone Narayan argued would constitute a breach of the terms of the contract in that it would not provide adequate protection of the warehouse. In this regard, it was argued that if the warehouse was programmed in this manner, this would allow an intruder to disarm the control box without detection.

[27] Mr Johannes Toerien, a technician employed by Fox, installed the alarm system. He was candid that he could not recall the installation. He did, however, state that he would "*definitely*" have programmed the warehouse as an instant zone given that the arming of the system took place in the office and allowed for the delay to achieve the exit from the outside door of the office. Narayan complains that no evidence was tendered in relation to the testing of the alarm system as to time delay. Quite what this would have entailed was not explained.

[28] Mr Casey testified that it would be almost impossible for a person to be undetected in an armed instant zone. Various propositions were put to Mr Casey in relation to measures which could be employed to avoid detection such as donning bubble wrap or a wetsuit or crawling under the bakkie which was found to have been moved from the position in the warehouse where it was parked when the premises were locked. These scenarios seemed improbable. Mr Casey was called on to deal also with the proposition that a jamming device could have been used to interrupt the signal to the control room. His view was that this too was improbable.

[29] Fox posited as the likely reason that the robbery was planned and orchestrated by employees of Narayan and Danga colluding with one another and that it was what is commonly known as an "inside job". Its theory was that employees of Narayan could have programmed the system in such a way that the warehouse zone was "bypassed" meaning that the passives would not react. Mr Bilakhia said he did not know how to bypass the zone and was sure that none of his employees would know how to do this either.

[30] Fox further posited that the passives which were installed in the warehouse could be impaired in their operation if obscured or "masked" by putting something in their path of operation to block the sensors. It is relevant that the stock in the warehouse was packed in bales and pallets which could be stacked in such a way that it was possible to use them to obstruct the sensors. Mr Bilakhia testified that he knew that the passives should not be obstructed and that he was careful that this not happen.

[31] There was a complaint that the passives which should have been installed were outdated technology. Mr Casey testified that there were, on the market at the time of installation, superior products which had what was described as an "anti – masking" feature. This allowed the sensor to send a message to the system if there was an attempt to mask or obstruct the field of operation which would have allowed for an alert to be sent in this instance. There was some dispute as to whether this technology was freely available in South Africa at the time of installation and to my mind this was not established. However little turns on this as it must be accepted that any attempt at

masking the devices would strongly suggest, if not be conclusive, of insider involvement.

[32] Mr Casey also testified that the prudent approach would have been to install a Telkom back-up line. Such a facility would have enabled the system to send signals even when the radio transmitter was disabled. The indications were however that at the time of installation of the alarm system there was not yet a Telkom line installed in the premises.

DISCUSSION

[33] Narayan argues that the obligation to install and monitor the alarm system encompassed the obligation to ensure that the signal was received. To my mind a more succinct encapsulation of the question is whether Fox had the obligation to install an alarm system which was fit for purpose. That purpose was to protect the warehouse from intrusion. This is what was sought by Mr Bilakhia.

[34] The scope of this obligation is a point of contention. Narayan contends that this obligation encompassed the doing of all things necessary to ensure that the signal would be received in the event of intrusion. Fox contends that its obligation was to install a working system which allowed for intrusion to be detected and a signal of such detection relayed to the control room of Fox so that the intrusion could be responded to by the deployment of armed guards to the premises.

[35] Narayan relied on the failure on the part of Fox to pay due heed to the requirements of the Security Industry Regulations promulgated in terms of the Security Industry Regulation Act 56 of 2001 which provides for rules which have binding effect on service providers. The point made was that the security industry is closely regulated because it is recognized by the Legislature that this is necessary to protect fundamental rights to life and security and the social and economic development of every citizen. Narayan placed the focus on the requirements in the rules that prescribe that agreements should be written and that the security provider plays an advisory role in relation to the optimum protection of the premises to be secured. Failure to adhere to the rules may result in a finding against the security provider of misconduct by the

Industry Regulatory authority and thus a criminal offence which can attract a penalty of a fine or imprisonment¹.

[36] Fox counters that no system is foolproof and that, in essence, “you get what you pay for”. It says that one must create security measures to counteract loss within a context which, from an elementary perspective, involves questions of cost outlay *versus* risk. Systems vary from the elaborate, involving the kitting out of the environment to be secured with various state-of-the-art detection equipment and technology backed up with the maximum number of armed guards on site, to the more basic, such as a mere alarm with no response component. The fact that the alarm system is there to protect a business premises also introduces questions of insurance requirements and profit considerations. The nature of the environment is another factor that must be considered – is it an area which is more vulnerable to crime; are there added security services in place?

[37] The question for this court to decide is whether Narayan has shown that Fox failed to comply with its obligations under the contract.

[38] The breach complained of by Narayan is that Fox has breached its obligations by failing to install equipment which was adequate to protect the premises and specifically by failing to install a Telkom line as a backup feature; failing to advise Mr Bilakhia that it would be preferable to install anti-masking passives which would avoid the passives being tampered with internally; and by failing to install passives in such a manner that they were programmed to trigger without delay so as to avoid a period which would allow for the system to be disarmed by the intruders.

[39] Mr Bilakhia testified that he relied completely on Mr Smit in relation to what was required in order to give him a proper alarm system which would simply work to protect him from burglary.

[40] Mr Smit however testified that Mr Bilakhia was focused on a cost-effective solution for the protection of the business premises. He wished to use his existing equipment which was in his old premises. Mr Smit testified that this was agreed to. In

¹ Rule 28 of the Code of Conduct for Security Providers

addition, Mr Smit recommended the installation of the 2 extra passives to cover all relevant areas.

[41] Mr Smit conceded that he had not been given any training specific to what was needed in relation to providing an adequate system but that it seemed to him that the passives were adequate in the circumstances.

[42] Whilst I accept that a service provider in the position of Fox plays a pivotal role in advising a customer as to what his best options and risks are in relation to his security requirements relative to cost and other circumstances, the customer must also play a part in conveying his needs and deciding on his options.

[43] I was particularly struck, on hearing the evidence of Mr Bilakhia by his abdication of any role or responsibility in the process of obtaining an alarm system which was consistent with his requirements. His constant refrain was that he had no technical expertise and that he left it up to the plaintiff "to give him a system that would protect his premises from intrusion." His approach appeared to be that it followed from the mere fact of the intrusion that this basic requirement was not met. But this is not so. The very best and assiduously attended systems can fail.

[44] Whilst citizens rely on the services of the security industry they cannot be supine in relation to their own role in their own security. They must collaborate in assuring optimum security. The relationship is symbiotic and those seeking to be protected must be careful to play their part. Mr Bilakhia presented as a businessman who was attuned to the specific risks to which the stock of the business was subject. He was insured, he was cognizant of the value of his stock, and he was aware of the need for his stock to be protected within his means. The premises in question was within a secure complex and thus the individual measures were additional to this first band of protection.

[45] The manner in which the contract was concluded was however haphazard and paid no attention to the setting out of the respective obligations of the parties and the operation of the system. It was imprecise and careless of the requirements of the industry. Indeed, the contract is, in essence, nothing more than an oral agreement. The written portion is comprised of a rudimentary one page standard form quotation

which contains no express terms other than a price for items to be supplied and installed and a vague reference to “Monitoring and Armed Response” services which would be charged out at R385 per month. The salient specifications as to the operation of the system are not in writing and neither are they clear. This is a far cry from the requirements of the regulations.

[46] This notwithstanding, it seems that the system supplied was adequate to protect the property in the normal course of its operation.

[47] Why this normal operation failed is the subject of speculation. In essence, Fox contends that most the likely scenario is that the robbery was an inside job whilst Narayan insists that the more likely event is that the passives were not timed to trigger immediately which allowed them to be disarmed.

[48] A report of a polygraph was put into evidence by Fox which suggested that an employee of Narayan and an employee of Denga had been untruthful with regard to their involvement in the robbery. Fox sought to make much of this, however to my mind it is also inconclusive.

[49] Also, the suggestion that a Telkom line would have averted the failure of this system is likewise speculative. Mr Casey conceded that this facility could have been deliberately disabled in a robbery.

[50] It also has not been established that the failure to alert Narayan to the benefits of a Telkom line constituted a breach of any duty of care or the contract itself. Indeed, it was put to Mr Bilakhia that there was no Telkom line available to the premises as at the date of installation. Mr Bilakhia was unable to dispute this, and it seems probable that this was the case.

[51] The passives installed were capable of being masked by obstructing the beam. Mr Bilakhia testified that he was made aware of this and that he was careful to make sure that the bales of cloth were not packed so as to create obstruction of the line of beam of the passives. Any masking of the beams would, in any event, point strongly to internal involvement.

CONCLUSION

[52] Narayan has not established that Fox failed to install a system that was not in accordance with Ns instructions and which was contrary to its needs to the extent that this constituted a breach of the contract.

[53] It is common cause that the system was fully operational on the night of the robbery.

[54] The fact that the cause of the failure of the system is not discernable and that there are possible causes which are not attributable to any breach or fault on the part of Fox, is a problem for the plaintiff.

[55] Narayan sought to rely on *Loureiro and Others v iMvula Quality Protection (Pty) Ltd* [2014] ZACC 4

[56] These matters are distinguishable. In *Loureiro* there were well defined contractual responsibilities and it was clear that the failure to adhere to an express term resulted in the burglary and thus the loss.²

[57] The plaintiff, Narayan has thus failed to establish any breach of the contract and the claim must fail.

ORDER

1. The plaintiff's claim is dismissed.
2. The plaintiff is to pay the costs of the action.

² In *Loureiro* the security guard ignored an express requirement that no access to the premise be allowed – because he believed those seeking to gain access were police, when in fact they were imposters.



FISHER J
HIGH COURT JUDGE
GAUTENG DIVISION, JOHANNESBURG

Date of Hearing: 31 August 2018.
Date of submission of further expert joint minute: 1 November 2018
Judgment Delivered: 4 February 2019.

APPEARANCES:

For the Plaintiff : Adv J Smith.

Instructed by : Cliffe Dekker Hofmeyer Inc.

For the Defendant : Adv R Van Der Merwe.

Instructed by : Richard Zanner & Associates.