

**HH 81-03
HC 10885/00**

MODCRAFT TRANSPORT (PVT) LIMITED
versus
VULTURES SECURITY (PVT) LIMITED

HIGH COURT OF ZIMBABWE
PARADZA J,
HARARE, 8 October, 2001 and 14 and 4 June, 2003

Mr *Debwe* for plaintiff
Miss *Chakasikwa* for defendant

PARADZA J: The plaintiff in this matter is a private company that operates a transport service at the corner of Willow Road and Harare Drive in New Ardbennie, Harare. Defendant on the other hand, is a security company that provides a guard service.

Sometime in December 1999 plaintiff and defendant entered into a contract in terms of which defendant was engaged by plaintiff to provide guard services at the property mentioned above occupied by the plaintiff. The exact terms and conditions of that contract are not clear as no document containing the terms of conditions of that contract was produced in evidence. Plaintiff produced a Bundle of Documents that contained certain correspondence between plaintiff and defendant that related to the claim contained in the Plaintiff's Declaration. What is important, however, is that the contract between the parties gave rise to a duty of care upon the defendant to guard the premises occupied by the plaintiff without negligence. It suffices therefore, to say that the contract between the parties gave rise to a delictual responsibility. The claim by the plaintiff is therefore based not only in contract but also in delict.

The plaintiff's claim is set out in the Plaintiff's Declaration. The basis of the claim is that sometime in December 1999 the parties entered into a contract in terms

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of which the defendant undertook to carry out a guard service in respect of the plaintiff's premises referred to above. One of the implied terms of that agreement was that the service to be provided was to be with due and care and without negligence. Despite that being so and whilst the defendant was guarding the premises, plaintiff lost 8 wheels of one type, another 8 wheels of a less expensive type and 8 rims of whose value was \$104 000,00. Plaintiff states that the loss of that property is attributable to the negligence of the defendant's employee who was on duty that night, in that he failed to guard the premises in such a way so as not to result in the loss of the property mentioned above. Plaintiff therefore claimed payment of that amount of \$104 000,00 together with interest at the prescribed rate upto the date of final payment.

The defendant denies the claim in respect of negligence but admits that indeed goods were stolen on 6 December, 1999 at plaintiff's premises. The defendant also puts to issue the value of the goods and put plaintiff to prove the value.

Evidence was called by the plaintiff from two people, a Mr Danha, the plaintiff's Financial Manager and a Mr Kango Mahomed, the plaintiff's Chief Security Officer. The evidence of Mr Danha was formal confirming the theft of the 8 tyres, tubes and rims that had been removed from a trailer that was parked on the premises. He also confirmed that the value of \$104 000,00 forming the basis the plaintiff's claim related to the total market value at the time of theft of the wheels, tyres and rims. Of importance in his evidence was the fact that the intruders who stole the property gained entry into the premises by removing certain panels from a wall which was erected around the premises. That process would have attracted the attention of an alert and diligent security guard. To him the guard who was on duty that night had failed to notice the intruders as they came in and removed the 8 wheels and managed to go away without being apprehended. To him the guard was either asleep or was unavailable to be able to notice the presence of the intruders.

Mr Mahomed testified that indeed the security guard had reported to him that he had seen an intruder walking around the plaintiff's premises when they eventually noticed that 8 wheels had been removed from a trailer. Mr Mahomed blamed the security guard for not taking reasonable action such as blowing a whistle or alerting the other security who was guarding a section of the same premises owned by the plaintiff. Further, Mr Mahomed said that the security guard should have noticed the intruders as they removed panels from the wall surrounding the premises. He also stated that to enable the intruders to remove the wheels from the trailer they should have used some lifting equipment such as a jack which would have further attracted the attention of the security guard. That did not happen and as far as he was concerned the guard had been negligent in the performance of his duties.

Evidence was led on behalf of the defendant from Mr Msengezi and the security guard known as Josephat Sithole. Mr Msengezi tried to support the defendant's case by stating that because the wheels were not secured at the time of the theft the plaintiff should be held responsible for the loss thereof. Josephat Sithole's evidence was that he saw two men hiding under a trailer on the premises. He decided not to do anything about it and instead he went to alert Mr Mahomed.

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Thirty minutes expired before Mr Mahomed was ready to come out of his room which is located at the premises. It is not in dispute that Mr Mahomed was either in the company of a girlfriend or a spouse. He took some time before he could come out of his room to attend to the intruders. As far as Sithole was concerned he could not be held as negligent as he had taken the right steps which he was instructed to take in the event of such happenings.

I was concerned that the security guard, Josephat Sithole, in his testimony, said that he did notice the intruders and decided not to do anything about it. Instead he decided to go and alert Mr Mahomed who took a long time to come out of his room to attend to the intruders. By that time the property in issue had been stolen. Mr Mahomed denies that he took more than 5 minutes to respond to the security guard's call for assistance. My view is that it is highly unlikely that Mr Mahomed would have taken such a long time to come out to attend to an incident which is his direct responsibility as Chief Security Officer of the plaintiff. The version by the security guard therefore is highly unlikely. What emerges out of his version is that instead of disturbing the activities of the thieves, he allowed them to carry on with whatever they were doing under the excuse that he, in terms of the laid down procedure, had to alert Mr Mahomed first. As a security guard it did not worry him that Mr Mahomed was taking a long time to attend. He obviously must have known that the longer it took, the chances were that the thieves would accomplish their purpose. To me, he did not act in the manner that a reasonable person would have acted in the circumstances. He was therefore negligent in the performance of his duties making his employers liable for the loss that was suffered by the plaintiff. I am not concerning myself with what other corrective measures were taken later. I would confine myself to what happened at the time of the theft and whether the conduct of the security guard amounted to a diligent performance of his duties or whether it amounted to negligence. I am also not concerned with the

submissions of the claims to the insurance company as they are of no consequence.

Those are events that occur after an incident has happened.

At the end of it all I am satisfied that in the circumstances, a diligent security guard in the position of Josephat Sithole would have taken reasonable steps to disturb the thieves and therefore stop the loss of property.

Defendant in his Heads of Argument deals with aspects that do not persuade me to think otherwise. Although defendant disputes the value thereof, I am satisfied that plaintiff has shown that the figure represents the market value of the property at the time. No suggestion has been made by the defendant that it was improper to use that value for purposes of his claim. No evidence has been led by defendant to disprove that value to show that either it was exaggerated or entirely incorrect. Under the circumstances I am satisfied that there is no basis upon which the value claimed by the plaintiff should be challenged.

I therefore make the following order -

(1) Judgment is hereby granted in favour of the plaintiff in the sum of

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**\$104 000,00 together with interest thereon at the prescribed rate of
30% *per annum* from the 6 December, 1999 to the date of full
payment;**

- (2) Defendant is ordered to pay the costs of suit.

***Mapfumo Debwe and Partners* , legal practitioners for plaintiff**

***Kantor & Immerman* , legal practitioners for defendant**