REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 05/27893

In the matter between:

GIESECKE AND DEVRIENT SOUTH AFRICA (PTY) LIMITED Plaintiff

and

TSOGO SUN HOLDINGS (PTY) LIMITED First Defendant

THE MINISTER OF SAFETY AND SECURITY Second Defendant

J U D G M E N T

MBHA, J:

INTRODUCTION AND BACKGROUND

[1] The plaintiff sued the defendants for damages suffered as a result of a loss of a substantial amount of money which was stolen during a robbery at

the first defendant's premises ("*Montecasino*") on 5 September 2004 at 15h30.

[2] The plaintiff's claim was initially based on the following grounds:

2.1 An enrichment claim against the first defendant on the basis that the robbery was perpetrated with the active assistance or involvement of an employee or employees of the first defendant, specifically Solomon Dube ("*Dube*") who acted within the course and scope of his/their employment with the first defendant, and that the plaintiff, under the mistaken belief that it was obliged to do so, subsequently made good the loss occasioned by the robbery by making payment of a monetary equivalent of the loss, for the benefit of the first defendant.

2.2 Alternatively, a delictual claim against the first defendant on the basis that the robbery was perpetrated with the active assistance or involvement of Dube an employee of the first defendant, alternatively Dube and other employees of the first defendant unknown to the plaintiff, who acted within the course and scope of his, alternatively, their employment with the first defendant.

2.3 Alternatively, a delictual claim against the second defendant on the basis that the robbery was perpetrated with the active assistance or involvement of William Kgathi ("*Kgathi*"), an inspector of the Johannesburg Serious and Violent Crimes Unit of the South African Police Service, who was acting within the course and scope of his employment with the second defendant and who had owed a statutory and constitutional duty to prevent crime and to protect the plaintiff.

2.4 Further alternatively, a delictual claim against the second defendant for theft of recovered amounts, in that Kgathi, Naidoo and Govender, and other employees of the first defendant whose identities are not known to the plaintiff stole or procured the theft of R3 million and R1,2 million respectively, being part of the money lost during the robbery and which at the time of such theft had been in the possession of Dube and other people suspected to have been either perpetrators or involved in the robbery.

[3] At the commencement of the trial, the court was advised that the plaintiff had since withdrawn its claims against the first defendant. The case, accordingly, only proceeded in respect of the second defendant.

[4] There was an agreement between the plaintiff, the first defendant and Firstrand Bank ("*FRB*") in terms of which the plaintiff undertook, for reward, to:

4.1 Provide cash processing and security services in order to process the gross daily value of the revenue generated by the first defendant's Montecasino.

4.2 Deposit the cash collected and processed with FRB.

[5] During the robbery on 5 September 2004, a sum of R23 914 610,00 was stolen.

[6] Subsequent to the robbery and during police investigations that ensued, R431 000,00 was recovered from Dube; R85 000,00 was recovered from Rachel Lifuwa (''Lifuwa'') and R607 000,00 was recovered from Richard Gumede ("*Gumede*"). Certain assets belonging to the suspects were procured and sold under the auspices of the Prevention of Organised Crime Act 121 of 1998. The nett amount claimed against the second defendant is R22 453 642,17.

[7] The following witnesses testified on behalf of the plaintiff:

7.1 Mr J J Viljoen – managing director of the plaintiff.

7.2 Mr J S Pearson – loss adjuster.

7.3 Ms A Turk – slot machine manager at Montecasino.

7.4 Prof L P Fatti – Professor of Statistics at the University of Witwatersrand.

7.5 Mr J J Kritzinger – Surveillance Investigator at Montecasino.

7.6 Mr A Few – Senior Manager at KPMG.

7.7 Senior Superintendent M Botha – SAPS.

[8] The plaintiff would also seek to rely on affidavits or statements made by either the perpetrators or people suspected to be involved in the robbery and by police investigators of the crime. As these are essentially hearsay, reliance would be placed, for their admission as evidence, on section 34 of the Civil Proceedings Evidence Act No. 25 of 1965, section 3 of the Law of Evidence Amendment Act, 45 of 1988, and to a lesser extent on Rule 38(2) of the Uniform Rules of Court and on the basis that these were informal admissions or statements against interest.

ISSUES FOR DETERMINATION

[9] The issues that have to be determined can be summarised as follows:

9.1 Whether the robbery which occurred at the plaintiff's cash processing centre at Montecasino on 5 September 2004, was perpetrated with the active assistance or involvement of an employee or employees of the second defendant, acting in the course and scope of his/their employment with the second defendant.

9.2 Whether an employee or employees of the second defendant, with knowledge of the contemplated robbery, failed in his or their duty to prevent the robbery.

9.3 Whether employees of the second defendant, acting in the course and scope of their employment with the second defendant, stole money which had been part of the proceeds of the robbery that had been recovered from suspects in the robbery and others.

THE EVIDENCE

[10] Mr J J Viljoen ("*Viljoen*") testified that on 5 September 2004 he was phoned and informed of the armed robbery that had taken place at Montecasino where a large amount of cash was taken. The robbery had occurred at the area known as the cash processing centre which is situated below the VIP parking. He said he arrived there at approximately 15h30 and by then a large contingent of policemen, numbering approximately 25, were already at the scene. These included members of the Serious and Violent Crimes Unit ("*SVU unit*"). Kgathi, a member of the SVU unit, arrived and after he had inspected the scene, he went to sit at a desk which is used for administrative work at the cash processing centre. He said he noted that Kgathi never interviewed anyone and neither did he take any notes whilst he was sitting there. Viljoen said an employee of Montecasino, Solomon Dube,

was later discovered to have been a co-perpetrator and/or planner of the robbery.

[11] Mr Johnston Pearson ("*Pearson*") is a loss adjuster and was employed by Lloyds Underwriters to investigate the circumstances surrounding the loss ensuing from the robbery. He said he got involved with the investigation and in the course of his liaison with the police investigators, the following information came to light:

11.1 Dube and one Gumede had been arrested on suspicions of being perpetrators of the robbery.

11.2 R1 123 000,00 had been recovered from the suspects and repaid to the insured.

11.3 That not all the money recovered from the robbers and/or suspects had been officially handed in to the police authorities in terms of the official procedures.

11.4 That Kgathi and other members of the SVU unit, specifically Govender and Naidoo, were suspected of misconduct involving theft or embezzlement of part of the money recovered from the suspects.

11.5 As a result of such suspicions the SVU unit was taken off the investigation.

11.6 Another police unit called Fedisa, headed by Snr Supt Botha was assigned to take over the investigation and was tasked to:

11.6.1 investigate allegations of misconduct by the SVU unit specifically Kgathi, Naidooi and Govender; and

11.6.2 investigate circumstances surrounding the robbery.

[12] Pearson confirmed in no uncertain terms that all he testified about was based on what had been told to him by other people involved in the investigations, specifically Snr Supt Botha. He also said that on one of his visits to the offices of Snr Supt Botha he saw a chart reflecting various calls made by and between Kgathi and some of the suspects. He was of the opinion that there were various leads which should have been followed by the investigative team but that these were deliberately overlooked.

[13] Ms A Turk ("*Turk*"), the slot machine manager at Montecasino, referred the court to official documentation from this casino which showed that:

13.1 Kgathi was a regular visitor and gambler at Montecasino and held a Platinum card issued by the casino which entitled him certain benefits, for instance regular VIP parking, earning redeemable points which could be exchanged for accommodation, meals, movies and so forth; and

13.2 That between 23 July 2001 to 13 September 2004 he had incurred a nett loss of approximately R970 322,00 through regular gambling at the casino.

[14] Prof Libro Paul Fatti ("*Fatti*") gave evidence as an expert. He testified that he had looked at all the documentary information procured from Montecasino pertaining to the arrivals and departure pattern of Kgathi at the casino. This covered the period 23 July 2001 until 7 November 2004.

14.1 The purpose of his testimony was to assist the court in deciding whether Kgathi's arrival and departure at the casino on 5 September 2004, at around 15h30 was merely a coincidence or chance event or whether or not it was more likely to have been deliberate and that he therefore could have been aware of the robbers' plans.

14.2 He concluded that the probability of Kgathi arriving at Montecasino on that Sunday afternoon at between 14h00 and 15h00, and leaving between 3 hours and 34 minutes later meant

that Kgathi's conduct was pre-planned, that he knew about the planned robbery and that his presence at the casino prior and after the robbery had not been a mere coincidence.

[15]

15.1 Mr Jacob Johannes Kritzinger ("Kritzinger") is employed at Montecasino as an investigator in the surveillance department. He testified that after the robbery, he reviewed all video tapes of the camera viewings situated inside the casino. After reviewing all the video tapes he compiled an edit tape containing extracts from the original tapes. He highlighted the fact that he could not get hold of the tapes of the video cameras situated inside the plaintiff's cash processing centre, where the robbery had taken place, as these were apparently taken by the robbers during the robbery. All the video footage was then compiled into a single DVD which was played to the court.

15.2 The DVD shows a silver-coloured BMW which was apparently used by the robbers entering the casino through the VIP entrance. Shortly thereafter Kgathi's vehicle is also seen arriving at the casino. The alleged driver of the BMW is seen entering the casino and moving around the area. He is also seen making calls on a cellphone. Kgathi is also seen entering the casino area. Dube also appears on the video and is seen entering the cash processing centre. Some moments later the BMW is seen

leaving the casino area. Kgathi's vehicle is also seen shortly thereafter leaving the casino area.

15.3 Kritzinger testified that he was informed by Dube that the man appearing in the video was a robber and that this person had pointed a firearm at him (Dube).

15.4 Kritzinger stated that personally he was unable to say whether or not this person was in fact one of the robbers.

[16]

16.1 Mr Allan Few ("*Few*") a senior manager at KPMG testified that on 10 November 2004 a restraint order under Case No. 2004/27996 was granted by this Court compelling surrender of property in terms of section 26 of the Prevention of Organised Crime Act, No. 121 of 1998. The order was against Kgathi, Naidoo and Govender.

16.2 Few stated that consequent to the grant of the order, he started investigating the financial affairs of Kgathi and discovered that he and his wife's monthly joint earnings came to approximately R10 000,00. He said that he found that Kgathi was living beyond his means, that he was in arrears with the levies of his residence amounting to R9 000,00 and that he could not even pay for his children's school fees. He also discovered that Kgathi was a

regular gambler and that his salary could not maintain his gambling habits. He also confirmed that over a certain specific period, Kgathi had lost in the order of R907 000,00 through gambling at Montecasino.

[17]

17.1 Snr Supt Marthinus Botha ("*Botha*") is the commanding officer of Fedisa, a unit within the SAPS that specialises in robbery investigations. Sometime after the robbery on 5 September 2005, the Provincial Commissioner of Police for Gauteng called him in and instructed him to take over the investigation pertaining to the robbery. At the time there were allegations that the SVU unit initially assigned to investigate the robbery had been involved in certain acts of misconduct. These related to recoveries which had been made following the robbery and that members of this unit had misappropriated the said recoveries.

17.2 Botha said that Fedisa's brief entailed:

17.2.1 investigating the circumstances of the robbery at Montecasino; and

17.2.2 investigating acts of alleged misconduct by certain members of the SVU unit to whom the

investigation was initially assigned, specifically Kgathi, Naidoo and Govender.

17.3 Botha said that soon after Fedisa had taken over the investigations, it was discovered that an employee of Montecasino, Solomon Dube, had since been arrested. Members of Fedisa then went to the Johannesburg Prison where Dube was detained to interview him.

17.4 Upon interviewing Dube on 18 September 2004, it was discovered that he had since given a statement to the SVU unit, specifically to Insp Hall of the said unit. Detective Inspector Andrews ("*Andrews*") of Fedisa then took another statement from Dube. Dube was assured at the time by members of Fedisa that his statement would not be used against him in a subsequent trial pertaining to the robbery. Botha said that the purpose of procuring the statement from Dube, was to ascertain if any members of the SVU unit were implicated in the robbery or whether any of the members had misappropriated any of the money which had been recovered.

17.5 After Dube was informed that approximately R430 000,00 had been recorded as being recovered by the SVU unit from him, Dube then informed Botha that at some point members of the SVU unit, including Kgathi, Naidoo and Govender took him to a

house in Tembisa where there was a bag of money which contained a large amount of cash. Dube said he had counted R3 million of the cash and that there was approximately R500 000,00 which was not counted. However, since it was part of his duties at Montecasino to count money, he was certain that the money not yet counted amounted to R500 000,00.

17.6 In the course of the interview Dube told Botha and other members of the Fedisa Unit that after the money had been recovered by members of the SVU unit, they all proceeded to a McDonalds outlet in Fourways where calls were made by the police officers whereafter they all proceeded to Alexandra Township. They later all drove to the offices of the SVU unit in Alexandra Township.

17.7 Botha said that Dube was adamant that the money he had already counted was R3 million and that over and above this, there was a further amount of approximately R500 000,00 which had not been counted. Dube could thus not accept that only R430 000,00 had been recovered by Kgathi and the other members of the SVU unit.

17.8 Botha testified that he obtained subpoenas in terms of section 205 of the Criminal Procedure Act No. 51 of 1977 (CPA) and procured the telephone records of the members of the SVU unit

who were implicated by Dube. He said the information obtained confirmed what Dube had told him as it showed that the said members had made various calls on the day and time mentioned by Dube. He said Dube had particularly mentioned the presence of one Inspector Ackerman. The telephone records for the day and time mentioned by Dube confirmed the presence of this police officer when the money was recovered from Dube.

17.9 Botha testified that after Fedisa had interviewed Dube, members of the SVU unit proceeded to procure a further statement from Dube. Botha also said he was aware that at some point Dube went to make out a pointing out concerning the recoveries of money allegedly misappropriated by members of the SVU unit. Botha said that statements were also procured from Gumede and Lifuwa about their involvement in the crime. However, Botha said he was not present when these statements were taken.

17.10 Botha testified that in his initial statement to the SVU unit Dube denied any involvement altogether in the crime. However, on 7 September 2004 he made a second statement to the same unit in which he confessed that he was involved. Botha said that nowhere in the confession did Dube implicate Kgathi or any other members of the unit in any wrongdoing or involvement in the crime. Botha said he likewise studied statements made by other people implicated in the robbery and which were also

given to members of the SVU unit. He confirmed that no member of the SVU unit was implicated in those statements.

17.11 Botha said he subsequently recorded all his findings in an affidavit. He confirmed however that all that was contained therein was based on what had been told to him by Dube and others. Botha was adamant that based on his investigations, Kgathi and other members of the SVU unit had not been involved in the planning or execution of the robbery. In his view had Kgathi known about the robbery, he would have known where the money was hidden.

17.12 He concluded that Kgathi was not in any way linked to the robbery. He said Dube had given other statements to Fedisa members, specifically to Insp Lemmer, wherein he expressly stated that neither Kgathi nor any other member of the SVU unit had been involved in any misconduct.

17.13 Botha was specifically referred to a part of Dube's statement procured from him on 18 September 2005, wherein Dube is recorded to have stated that it was Botha who actually approached him and told him that he had information that R3,4 million was recovered from him but that money that was declared to the State was only R436 000,00. Botha was adamant that this was not correct and denied vehemently that he made any such suggestion to Dube. Botha also confirmed that

Gumede similarly made a statement to him in which he alleged that members of the SVU unit had recovered part of the stolen money but had omitted to hand all of it into the SAP13 as was required in terms of the rules.

[18] Mr Tyson Moyo ("*Moyo*") is currently employed as the complex duty manager at Montecasino. He testified that on the day of the robbery he was not on duty. He said that on Tuesday 7 September 2005 at approximately 05h00 Kgathi and other members of the police came to his house where they conducted a search looking for the money. They also asked about the whereabouts of his half-brother Howard Hlabangani. Neither the money nor Howard could be found and the police took him to a house where his sister Nomsa Khumalo stayed together with his other half-brother, Zulu who is also known as Heavens Magalela. When they got there they found one of his younger brothers Fana. He said the police took him and Fana to Montecasino where Howard was arrested. All three were taken to the Alexandra Police Station where they found Solomon Dube in the company of Insp Hall and other police officers. Fana and Howard were taken to one room whilst he and Dube were taken to a separate room. Whilst they were there, Kgathi arrived and told Dube that Nomsa Khumalo had phoned and told him that they had given him (Dube) his share of the robbed money. Kgathi then demanded to know where he (Dube) had hidden the money. Dube replied that the money was hidden in Temibsa. Thereafter Kgathi and other members of the police took Dube in a white Toyota Corolla to go and fetch the money from the hiding place. On their return Dube came to where Moyo and Howard were and at

that point Insp Hall confronted Dube telling him he could not believe that he was put through the whole ordeal of the robbery for a mere R400 000,00. Moyo said that at that point Dube insisted that he was certain that he gave Kgathi between R3 million and R4 million.

[19] Adv Cook, appearing for the plaintiff, informed the court that the plaintiff wished to rely on a number of documents, which contain hearsay evidence, as part of its case. This included:

19.1 Affidavits deposed to by Senior Superintendent Botha;

19.2 Affidavits deposed to by Dube;

19.3 Affidavits deposed to by Richard Gumede; and

19.4 Affidavits deposed by Rachel Lifuwa.

Thereafter the plaintiff closed its case.

[20] I was called upon by counsel for the second defendant, to rule on the admissibility of the documentary evidence referred to above, being statements by Dube, Gumede, Lifuwa and Botha. Adv Cook submitted that the statements ought to be admitted into evidence and their probative value to be assessed at the conclusion of the trial together with the rest of all the evidence.

[21] I was unable to agree with Adv Cook in this respect. In my view the question of the admissibility of the statements had to be dealt with at this

point. The plaintiff having closed its case, the defendant is entitled to know what case it has to meet.

[22] This position was adequately addressed by Cameron JA in the case of *S v Ndhlovu and Others* 2002 (2) SACR 325 (SCA) at 338B-C where, in dealing with section 3 of the Law of Evidence Amendment Act 45 of 1988, he said the following:

> "*Third, an accused cannot be ambushed by the late or unheralded admission of hearsay evidence. The trial court must be asked clearly and timeously to consider and rule on its admissibility. This cannot be done for the first time at the end of the trial, nor in argument, still less in the court's judgment, nor on appeal. The prosecution, before closing its case, must clearly signal its intention to invoke the provisions of the Act, and, before the State closes its case, the trial Judge must rule on admissibility, so that the accused can appreciate the full evidentiary ambit he or she faces.*"

Cameron JA referred, with approval, to the case of *S v Ramavhale* 1996 (1) SACR 639 (A) and said (at page 338g-i):

> "*Ramavhale makes clear that unless the State obtains a ruling on the admissibility of the hearsay evidence before closing its case, so that the accused knows what the State case is, he or she cannot thereafter be criticised on the basis of the hearsay averments for failing to testify. It also suggests, rightly, that unless the court rules the hearsay admissible before the State closes its case, fairness to the accused may dictate that the evidence not be received at all. (This does not preclude the State in an appropriate case from applying to re-open its case.)*"

In *S v Molimi* 2008 (2) SACR 76 (CC), at 86D-E, Nkabinde J confirmed the correctness of the approach of *S v Ndhlovu* that:

22.1 The reception of the hearsay evidence must not surprise the accused.

22.2 The reception should not come at the end of the trial when the accused is unable to deal with it.

22.3 The accused must understand the full evidentiary ambit of the case against him or her.

It follows that unless the accused – the second defendant in this case – knows what case he has to meet, he is left to "*range around vaguely*" on the question of the ambit of the admitted evidence.

[23] During argument Adv Cook submitted that the cases just referred to concerned the aspect of the fairness of a criminal trial to the accused. I am unable to agree with this submission.

[24] Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 expressly provides that the rules governing the admission of hearsay evidence apply equally to criminal and civil proceedings. What has been said above, albeit in criminal cases, applies equally to civil proceedings. The second defendant likewise is entitled to know what case he has to meet at the time the plaintiff has closed its case. It is at this point that the plaintiff must clearly signal its intention to invoke the provisions of section 3 of the Law of

Evidence Amendment Act 45 of 1988 when it seeks to have hearsay evidence admitted. If this were not to happen, the second defendant would be left to "*range around vaguely*" and would clearly be prejudiced in the conduct of its defence. This position has been affirmed in the case of *Mdani v Allianz Insurance Ltd* 1991 (1) SA 184 (A) at 190 where the Appellate Division remitted a matter to the trial court so that it could exercise its discretion whether or not to admit the hearsay evidence in terms of section 3(1)(c) of the Law of Evidence Amendment Act, 45 of 1988 and if it was admitted, for the respondent to consider re-opening its case.

[25] After having heard argument by both counsel, I ruled as follows:

25.1 The statements of Solomon Dube, Richard Gumede and Rachel Lifuwa and the annexures thereto are inadmissible evidence.

25.2 The evidence and statements of Senior Superintendent Botha, based on the aforesaid statements of Solomon Dube, Richard Gumede and Rachel Lifuwa and the conclusions derived therefrom, are inadmissible evidence.

I indicated that my reasons would follow later. These are my reasons.

[26] After my aforesaid ruling, the second defendant elected to close its case without leading any further evidence.

[27] The documents which the plaintiff wished to rely on as part of his case include:

27.1 Statements of witnesses and suspects in relation to the investigation of the case as attached to the affidavit of Senior Superintendent Botha given on 9 November 2004.

27.2 Six statements made by Solomon Dube which can be found in Volume 2 of the bundle at:

27.2.1 page 447 – dated 5 September 2004;

27.2.2 page 471 – dated 7 September 2004;

27.2.3 page 553 – dated 18 September 2004;

27.2.4 page 581 – dated 21 September 2004;

27.2.5 page 616 – dated 14 October 2004;

27.2.6 page 603 – dated 23 September 2004.

27.3 Five statements made by Richard Gumede which are also found in Volume 2 of the bundle on page 495 dated 15 September 2004.

27.4 Statements made by Rachel Lifuwa in Volume 2 at pages 523, 528 and 640 and in Volume 5 of the bundle at pages 1778 and 1783.

[28] The plaintiff sought to persuade the court to admit the documentary evidence in order to establish, essentially, the following:

28.1 That the investigation by the Serious and Violent Crime Unit ("*the SVU unit*") into the Montecasino robbery was irregular and improper.

28.2 That Kgathi, Naidoo and Govender, and other members of the SVU unit, used a scheme or *modus operandi* to steal cash or items of substantial value from persons involved in or connected to criminal activity.

28.3 That part of the *modus operandi* employed by Kgathi and others was to recover goods during a police investigation, and to retain the goods or a portion thereof for themselves.

28.4 That Dube handed to Kgathi and other members of the SVU unit a bag containing an amount of approximately R3,5 million, of which only an amount of R431 000,00 was accounted for and returned to the plaintiff.

28.5 That Gumede handed to Kgathi and other members of the SVU unit an amount of approximately R1,2 million of which only a sum of R607 000,00 was accounted for and returned to the plaintiff.

28.6 That Lifuwa handed to Kgathi and other members of the SVU unit an amount of R550 000,00 of which only an amount of R85 000,00 was accounted for and returned to the plaintiff.

28.7 That the booking of money recovered during the course of the investigation into the Montecasino robbery, was irregular and that an incorrect procedure was followed.

[29] The plaintiff also sought to have admitted the *viva voce* evidence of Moyo while conceding that it was essentially hearsay in nature. In this regard it was submitted that Moyo corroborated the assertions made by Dube in his statements to the effect that a sum of approximately R3,5 million was contained in the bag handed to Kgathi and his colleagues. Furthermore, it was submitted that Moyo's evidence showed that Dube had spontaneously reacted to Hall's assertion that Dube's friends had put him in his predicament for a mere R400 000,00, to which Dube had spontaneously responded that the amount he had handed to police was not R400 000,00, but was between R3 million to R4 million.

[30] In addition, the plaintiff wished to rely on the interpretation placed by Botha in an affidavit on the different affidavits deposed to by Dube, Gumede and Lifuwa.

[31] It is common cause that the documents which the plaintiff wishes to have admitted were made by persons who were all suspects in the robbery at Montecasino. Both Pearson and Botha told the court that Dube and Gumede had absconded. Furthermore, it is trite that during the criminal trial of Kgathi, Govender and Naidoo which served before Snyders J, in which judgment was handed down on 4 April 2006, Gumede was, on request of the State, duly warned in terms of section 204 of the Criminal Procedure Act 51 of 1977. By his own admission, Gumede was involved in the robbery at the Montecasino on 5 September 2004.

[32] In her judgment, Snyders J stated that Gumede had started giving evidence on Wednesday 8 March 2006, that his evidence-in-chief was completed just before the lunch adjournment, but that he never returned to court for the continuation of his cross-examination.

[33] There is no doubt about the hearsay nature of the documentary evidence of Botha, Dube, Gumede and Lifuwa and to a large extent that of Moyo.

[34] During argument the plaintiff relied, for the admission of that hearsay evidence, on:

34.1 Section 34 of the Civil Proceedings Evidence Act, 25 of 1965 ("*Evidence Act*");

34.2 Section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 ("*Evidence Amendment Act*"); and

34.3 To a lesser degree on the principle governing the informal admissions and statements against interest of a party.

Although it was indicated during the plaintiff's opening address, that reliance would also be placed on Rule 38(2) of the Uniform Rules of Court, this route was abandoned during argument.

[35] Before I proceed to examine the basis upon which plaintiff relied to have the hearsay evidence admitted, I deem it appropriate to state the well-known fundamental rules governing hearsay evidence and the exceptions to the general rule.

[36] The general rule is that evidence presented in the course of proceedings must be the best available evidence. In trial proceedings, this rule generally entails that the person upon whose credibility the probative value of the evidence depends, not only gives the evidence but is also available for cross-examination.

[37] There are however exceptions to this general rule. The principles underlying these exceptions are usually twofold:

37.1 That there must be a good reason why the witness cannot give evidence in person, such as death, impracticality or that the witness is untraceable.

37.2 The evidence is nonetheless reliable (that is the fact that the evidence cannot be tested by cross-examination does not substantially undermine its probative value).

[38] It is trite that the rule concerning the inadmissibility of non-testimonial evidence is more relaxed in civil proceedings than in criminal proceedings. In *S v Ndhlovu (supra)* at p 337A-B Cameron JA highlighted the fact that the Evidence Amendment Act (section 3(1)(c)(i)) requires that specific account be taken of the "*nature of the proceedings*". The learned judge noted that this specific part of the Act alludes "*…to the distinction not only between application and trial proceedings, but more pertinently to that between civil and criminal proceedings*". He noted further that the overriding feature of criminal proceedings was that the State bears the *onus* of establishing the guilt of the accused beyond reasonable doubt and that this would always weigh heavily not only in the admission of hearsay evidence, but also on the weight the court accorded it.

THE EVIDENCE ACT

[39] Section 34 of the Evidence Act provides as follows:

"*34.* ***Admissibility of documentary evidence as to facts in issue.-*** *(1) In any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and intending to establish that fact, shall on production of the original document be admissible as evidence of that fact, provided -*

(a) the person who made the statement either:

(i) *had personal knowledge of the matters dealt with in the statement; or*

(ii) *where the document in question is or forms part of a record purporting to be a continuous record,*

made the statement (insofar as the matters dealt with therein are not within his personal knowledge) in the performance of a duty to record information supplied to him by a person who had or might reasonably have been supposed to have personal knowledge of those matters; and

(b) the person who made the statement is called as a witness in the proceedings unless he is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him have been made without success.

(2) The person presiding at the proceedings may, if having regard to all the circumstances of the case he is satisfied that undue delay or expense would otherwise be caused, admit such a statement as is referred to in subsection (1) as evidence in those proceedings -

(a) notwithstanding that the person who made the statement is available but is not called as a witness;

(b) *notwithstanding that the original document is not produced, if in lieu thereof there is produced a copy of the original document or of the material part thereof proved to be a true copy.*

(3) Nothing in the section shall render admissible as evidence any statement made by a person interested at the time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might tend to establish.

(4) A statement in a document shall not for the purposes of this section be deemed to have been made by a person unless the document or the material part thereof was written, made or produced by him with his own hand, or was signed or initialled by him or otherwise recognised by him in writing as one for the accuracy of which he is responsible.

(5) For the purpose of deciding whether or not a statement is admissible as evidence by virtue of the provisions of the section, any reasonable inference may be drawn from the form or contents of the document in which the statement is contained or from any other circumstances, and a certificate of a registered medical practitioner may be acted upon in deciding whether or not a person is fit to attend as a witness."

SECTION 34(1)

[40] In my view, Botha's affidavit in particular, falls foul of this provision, specifically section 34(1)(a)(i), which requires personal knowledge of the matters dealt with in the statement. Botha's affidavit contains his interpretation of the contents of statements by the suspects in the robbery namely Dube, Gumede and Lifuwa. Apart from the fact that this in a way amounts to the usurping of the function of the court, Botha himself conceded under cross-examination that his knowledge about the facts relating to this case, as contained in his affidavit, was wholly based on what he had learnt from others. Clearly he has no personal knowledge of the matters dealt with in his affidavit.

[41] Regarding the other affidavits of Dube, Gumede and Lifuwa, these, in my view, fall foul of the provisions of section 34(1)(b) which requires that the

author of the statement be called as a witness in the proceedings, alternatively, it be shown to the satisfaction of the court that it was not reasonably practical to secure his or her attendance or that all reasonable efforts to find him or her have been made.

[42] No satisfactory evidence was led regarding the present whereabouts of the makers of these statements. As far as Dube and Gumede are concerned, the court was merely advised that they had absconded. As I mentioned earlier, Gumede disappeared during the trial before Snyders J in 2006. No information was placed before the court in relation to specific steps that were taken to try and locate either Dube and Gumede.

[43] As far as Lifuwa is concerned, no iota of evidence was led about what steps, if any, were taken to try and locate her. It will be noted that in all her affidavits she gave a specified residential and work address as well as her personal identification number. For all intents and purposes she might still be residing at the given address within the Johannesburg area.

[44] As I am not persuaded that any diligent steps were taken to trace any of the suspects, I find that the request to admit these documents should fail purely on the basis of non-compliance with the provisions of the section under review.

[45] With regard to the provisions of section 34(1)(a)(ii), the documents that are sought are not "*a continuous record … in the performance of a duty to record information*" such as bank statements and like documents.

The documents concerned are merely affidavits by the suspects and do not fall into the category of being a continuous record. Even if I am wrong in this respect, it would be necessary for their admissibility that the persons who took down the statements are called as witnesses in the proceedings. Botha testified that some of Dube's statements were taken down by Insp Andrews. The court specifically asked why was the said Andrews not called as a witness but no reasonable explanation was furnished. The other affidavits of the other suspects were also taken down by other police officers and, similarly, these officers were never called.

[46] The remarks of Erasmus J in *Schimper and Another v Monastery Corp and Another* 1982 (1) SA 612 (O) at 614H are particularly appropriate. He said the following:

> "*Even if the affidavit falls within the scope of ss (1)(a)(ii), it is also necessary for its admissibility that the person who made the statement is called as a witness in the proceedings. Pruis is not a witness in these proceedings and the discretion the Court has in terms of s 34(2)(a) can neither to my mind be exercised in respect of the affidavit in terms of s 34(3) …*"

As will be shown later, section 34(2)(a) gives the court a discretion to admit a document if, having regard to all the circumstances of the case, the court is

satisfied that undue delay or expense would otherwise be caused notwithstanding that the person who made the statement is available but is not called as a witness.

[47] As I have already indicated, no reasonable or plausible explanation was advanced about the whereabouts of the suspects nor was any attempt made to persuade the court that undue delay or expense would be caused by calling any of the relevant witnesses.

[48] Having regard to section 34(1)(b), the court was called upon to find that the statements may be admitted if the witness "*is dead or unfit by reason of his bodily or mental condition to attend as a witness or is outside the Republic, and it is not reasonably practicable to secure his attendance or all reasonable efforts to find him had been made without success*".

[49] Where no evidence is tendered to show that it was not reasonably practicable to secure the witnesses' attendance at court and that all reasonable efforts had been made without success, this, in my view amounts, to fatal non-compliance with the provisions of the section and as such the statements concerned cannot be admissible. Southwood J aptly captured the position when he remarked as follows in the case of *Skilya Property Investments (Pty) Ltd v Lloyds of London* 2002 (3) SA 765 (T) at 800B-D:

> "*In the present case some of the witnesses are in Mozambique and some of the witnesses are in South Africa, but there is no evidence that it is not reasonably practicable to secure their attendance at Court or that all reasonable efforts have been made to find them without*

> *success. In these circumstances it cannot be found that the requirements of s 34(1) have been satisfied and that the statements are admissible. … there is no evidence to show that undue delay or expense would be caused by calling any of these witnesses.*"

[50] Finally, section 34(1) requires the production of the original document. Counsel for the plaintiff submitted that the court has a discretion with regard to all the circumstances, to admit an affidavit or statement even if the original document is not produced, so long as a true copy of the original document is furnished.

[51] I interpose to state that prior to the commencement of the trial, the parties agreed as follows:

> "*The second defendant agrees that the documents in the bundle are what they purport to be, that copies can be used but maintains that the correctness of the contents remain in dispute.*"

Although the aspect of originality is satisfied, the documents concerned still fall foul of the other provisions of section 34(1) of the Evidence Act as I have already demonstrated.

SECTION 34(2)

[52] A further requirement for admissibility under this section, is that the court must be satisfied that undue delay or expense would otherwise be caused if the statements are not admitted. Clearly there is a discretion to

allow documents under this section when the court is convinced that undue delay or expense would otherwise be caused if the appearance of the declarant or the production of the original document were insisted upon.

[53] In my view no facts were placed before the court in order to determine whether there would be an undue delay or expense if the statements are not admitted. I have already alluded to the fact that the court was merely told that Dube and Gumede have absconded and that nothing was said about any efforts made to try and locate Lifuwa.

[54] In the circumstances I find that the prerequisites laid down in section 34(2) have not been met nor was there any basis laid for the admission of the affidavits.

SECTION 34(3)

[55] This subsection expressly provides that:

> "*Nothing in this section shall render admissible as evidence any statement made by a person interested at a time when proceedings were pending or anticipated involving a dispute as to any fact which the statement might turn to establish.*"

Clearly, inadmissibility would follow if statements were made by a person interested "*at a time when proceedings were pending or anticipated* …".

In Butterworths "*Law of Evidence*" at page 18-31 the word "*anticipated*" is interpreted as follows:

> "*The words 'were anticipated' introduce a subjective element. Even if no case is pending, it is possible that the declarant anticipates a subsequent action, as may well be the case where, shortly after an accident, one of the drivers makes a statement to a police official. …*"

[56] In *United Tobacco Ltd v Goncalves* 1996 (1) SA 209 (W) at 212F-I, Van Blerk AJ confirmed that even if the question of admissibility would only arise in a subsequent civil action, the fact that the statement was made in criminal proceedings in which the declarant gives evidence as an accused, was sufficient to exclude the statement. Furthermore, it was also only necessary that proceedings be pending, not necessarily the proceedings in which the evidence was adduced.

[57] In *Da Mata v Auto, NO* 1972 (3) SA 858 (A), at 882A, the court confirmed that proceedings are "*anticipated*" within the meaning of section 34(3) when they are regarded as likely or as reasonably probable.

[58] It was submitted on behalf of the plaintiff, that as far as Dube, Gumede and Lifuwa are concerned, it was doubtful that they anticipated any proceedings and that no proceedings were pending at the time when their statements were taken. It was further submitted that even if one would assume that they had anticipated proceedings being instituted against Kgathi and others, it could not seriously be contended that anyone of them would have had any interest in those proceedings or the outcome thereof.

[59] I am unable to agree with this submission. In my view there can be no doubt that Dube made his statement in anticipation of the criminal trial that was to follow after the robbery. There can also be no doubt that the statements by Gumede and Lifuwa, all of whom were in fact arrested for the robbery, fall in the same category. It must be remembered that when Botha obtained further statements from Dube, Gumede and Lifuwa, it was clearly anticipated that members of the SVU unit would be investigated for the possibility of prosecution in relation to theft of monies allegedly retrieved from the suspects. In this regard Botha testified that the mandate of Fedisa which he led was twofold, firstly, the robbery at Montecasino and secondly, to "*investigate the conduct of the SVU Unit*".

[60] From Botha's evidence, it was clear that his investigation pertained to the loss of money and that the statements which he obtained from the suspects were for purposes of bringing criminal proceedings against Kgathi and others. In fact, the suspects were advised that their statements would not be used against them on condition that they cooperated to supply evidence against Kgathi and others.

[61] It is common cause that Kgathi and others were in fact prosecuted for the theft of monies and that they were acquitted by Snyders J of the theft of monies pertaining to the Montecasino robbery. Clearly the statements were obtained for prosecution purposes. According to Botha, Gumede gave evidence at the trial of Kgathi, Naidoo and Govender but Dube,who was supposed to give evidence, absconded. It is clear that the statements by

suspects were taken for purposes of criminal proceedings. It follows that the statements are consequently inadmissible by virtue of the provisions of section 34(3).

[62] I am unable to agree with the plaintiff's contention that the suspects i.e. Dube, Gumede and Lifuwa were not "*interested persons in the proceedings*". In this regard the plaintiff submitted that a "*person interested*" must not be confused with a person being "*prejudiced*". There was an attempt to rely, in this respect, on the decision in *Colgate-Palmolive (Pty) Ltd v Elida-Gibbs (Pty) Ltd* 1990 (2) SA 516 (W) where it was highlighted that there were difficulties in interpreting the phrase "*person interested*". It is however noteworthy that no attempt was made in that case to define the meaning of the phrase. Significantly the court only dealt with what was not encompassed by the phrase. The court merely stated that a person interested is not a person who was prejudiced.

[63] Adv Cook said that the facts in this case were plainly distinguishable from *United Tobacco Co Ltd v Goncalves (supra*). In that case, the court found that the statements concerned were made by a person who had an interest in putting the blame on the defendant (his employee) to ensure that the defendant rather than he was prosecuted.

[64] In my view, the facts in *United Tobacco Co Ltd* are on all fours with the present case. Clearly Dube's interest was to try and shift the blame onto Kgathi and his colleagues to ensure that they, rather than he was prosecuted.

It accordingly follows that Dube and the other suspects clearly had an interest when they made those statements. The suspects' statements therefore fall foul of the provisions of section 34(3) and are accordingly rendered inadmissible.

SECTION 34(4)

[65] This section requires that the document must be made or produced by the witness with his own hand or signed and initialled by him as a statement for the accuracy of which he is responsible. Clearly this cannot be done without calling the interpreter who interpreted when the statement was made. It is clear from the statements taken by the SVC unit that interpreters were used to take those statements. For example when statements of Dube Gumede were taken one, police official by the name of Miya acted as an interpreter.

[66] Insofar as the statements taken by Fedisa are concerned, it is clear that Dube, according to Botha, could speak English well. His statement, however, appears in Afrikaans and the person who took that statement i.e. Andrews also translated the statement into Afrikaans. For that purpose Andrews fulfilled the function of the interpreter for the taking down of those statements which are recorded in Afrikaans. In my view the failure to call interpreters falls foul of the provisions both of section 34(4) and section 34(1). The position was aptly captured by Broome DJP, in the case of *Magwanyana*

and Others v Standard General Insurance Co Ltd 1996 (1) SA 254 (D) at 257A-G where he said the following:

> "*Mr Patel contended that the requirements of s 34(1) were not fulfilled because the interpreter, Constable Mlambo, was not called as a witness. This, he argued, created a double hearsay situation. I accept this argument. It is clear that the statement … is a statement contemplated by s 34(4). It was signed by David Sithole and it was on oath. It must therefore have been recognised by him as one 'for the accuracy of which he is responsible'. I agree that the statement does in fact depend for its admissibility in terms of s 34(1) on the evidence of the interpreter, Constable Mlambo, that he interpreted what David Sithole said to him. There is no evidence that Constable Mlambo was not available or that all reasonable efforts to find him had been made without success. In these circumstances there is, I find, a missing link, that link being the evidence of the interpreter to the effect that he correctly interpreted to Constable Buckle what David Sithole had said.*
>
> *On my reading of s 34(1), it requires proof that the statement in the document in question was made by the person in question. Here the statement in the document in question is essentially a statement by the interpreter of what David Sithole told him. See R v Mutche 1946 AD 874. Constable Buckle's evidence is in effect, 'I wrote down what Constable Mlambo told me', which, coming from Constable Buckle, is hearsay (a) as regards the implication that Constable Mlambo said to Constable Buckle that he had correctly interpreted to Constable Buckle all that David Sithole had said, and (b) as regards the truth of what David Sithole told Constable Mlambo. If Constable Mlambo had testified, 'I translated to Constable Buckle what David Sithole told me', that, coming from Constable Mlambo, would eliminate the hearsay referred to in (a) above but it would be hearsay as regards (b) above. It would be admissible under s 34 if Constable Mlambo had so testified, the hearsay being only that mentioned in (b) above. In these circumstances, I consider that there is this missing link, which means that it does not qualify to be admitted under the provisions of s 34(1).*"

[67] In my view the failure to call Andrews and the interpreters causes the "*missing link*" referred to by Broome DJP resulting in the statement of Dube, Gumede and Lifuwa not qualifying to be admitted under the provisions of section 34(1) and section 34(4). I accordingly find that the statements by

Botha, Dube, Gumede and Lifuwa all fall foul of the provisions of section 34 of the Evidence Act and are accordingly inadmissible.

THE EVIDENCE AMENDMENT ACT

[68] Section 3 of the Evidence Amendment Act provides that:

> "*(1) Subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence in criminal or civil proceedings, unless –*
>
> (a) *each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings;*
>
> (b) *the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings; or*
>
> *(c) the court, having regard to –*
>
> *(i) the nature of the proceedings;*
> *(ii) the nature of the evidence;*
> (iii) *the purpose for which the evidence is tendered;*
> (iv) *the probative value of the evidence;*
> (v) *the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;*
> (vi) *any prejudice to a party which the admission of such evidence might entail and*
> *(vii) any other factor which should in the opinion of the court be taken into account;*
>
> *is of the opinion that such evidence should be admitted in the interest of justice.*
>
> *(2) The provision of sub-section (1) shall not render admissible any evidence which is inadmissible on any ground other than such evidence is hearsay evidence.*

(3) Hearsay evidence may be provisionally admitted in terms of sub-section (1)(b) if the court is informed that the person upon whose credibility the probative value of such evidence depends, will himself testify in such proceedings: Provided that if such person does not later testify in such proceedings, the hearsay evidence shall be left out of account unless the hearsay evidence is admitted in paragraph (a) of sub-section (1) or is admitted by the court in terms of paragraph (c) of that sub-section.

(4) For the purpose of this section – 'hearsay evidence' means evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence;

'party' means the accused or party against whom hearsay evidence is to be adduced, including the prosecution."

[69] A simple reading of section 3(1) reveals that the Evidence Amendment Act can only come into operation "*subject to the provisions of any other law*". As I have already ruled that the statements concerned are inadmissible in terms of the Evidence Act, it follows that the statements could never be considered admissible under the Evidence Amendment Act.

[70] As I have already ruled that the statements by Dube, Gumede and Lifuwa are inadmissible, Botha's subsequent statement can thus be seen in its proper perspective. Clearly his entire evidence is hearsay. It will be recalled that he told the court in no uncertain terms that he has no personal knowledge of the facts therein contained. Clearly his evidence and statements are based on the inadmissible statements of others and as such is double hearsay and of no value. Part of his evidence is an interpretation of that which he had heard, clearly a function of the court and not of a witness who is only allowed to lay the facts before a court.

[71] Botha's evidence and statements do not fall into the two recognised exceptions I have referred to above. His evidence is totally inadmissible as it is entirely based on what was told to him. Undoubtedly it falls foul of the provisions of section 3 of the Evidence Amendment Act.

[72] Without dealing with each and every aspect of section 3 of the Evidence Amendment Act, it is quite apparent that the probative value of the evidence is weak, it being based on inadmissible evidence. No sufficient or reasonable explanation was supplied why the persons upon whose credibility the probative value of the evidence depends, were not called in order to place the court in a position to determine the factors set out in sections 3(1)(c), 4 and 5 of the Evidence Amendment Act. It suffers the same problems with the statements referred to above.

[73] I accordingly come to the conclusion that it would not be in the interests of justice to admit the hearsay based on inadmissible hearsay evidence nor the opinions of Botha which remain inadmissible. Furthermore the evidence of Botha also falls to be disallowed insofar as that evidence is based on the statements of other witnesses.

[74] It is trite that the crucial enquiry in circumstances as in the present is to what extent the value of the evidence sought to be admitted, depends on the credibility of the absent witness and also to what extent the dangers of relying on that evidence are outweighed by indications of reliability. Factors that

have to be taken into consideration to determine the probative value of the evidence include:

(a) the relationship, if any, between the absent witness and the other parties;

(b) the possibility of a motive for making false allegations (usually flowing from (a);

(c) the spontaneity of what was said and whether it was said without any particular object in mind;

(d) the circumstances in which the absent witness made the allegation;

(e) the reputation for honesty of the absent witness;

(f) the lapse of time between the event and the statement made about it to the witness testifying in court;

(g) the opportunity the absent witness had for observation of the event, and any other factors possibly influencing the reliability of that observation (as for example nearsightedness or dim light); and

(h) the manner in which the information was conveyed (particularly whether oral or written).

[75] In this case Dube, Gumede and Lifuwa who were suspects in a robbery were used as witnesses to make a case against other police officers, specifically Kgathi and others. The suspicion is clearly unavoidable that the suspects would have a motive to minimise their own involvement in the robbery. In the same vein consideration has to be given to the fact that Dube only implicated Kgathi and others of any wrongdoing in the subsequent statements, having omitted to do so in his initial statement. It must also be borne in mind that Botha was confronted, during cross-examination, with one statement wherein it was alleged that he had in fact suggested to Dube that greater amounts had been recovered by the SVU unit for him.

[76] Regard must also be paid to the fact that the statements are from robbers, some of whom originally denied any involvement in the robbery and only later, with a promise from Botha and others that their statements would not used against them, made a volte face and deposed to statements in which they implicated Kgathi and others. There is no question that these statements are not spontaneous. It is reasonable to conclude that these statements were made in order to exonerate themselves and implicate members of the South African Police in the crime.

[77] In the light of all what has been stated, I have come to the conclusion that neither the statements of the suspects who did not testify nor the hearsay evidence of Botha based thereon should be admitted in evidence.

INFORMAL ADMISSIONS AND STATEMENTS AGAINST INTEREST

[78] An attempt was made by plaintiff to have admitted in evidence the statements made by Botha. It was submitted that Botha's statements (and of the other investigators) were made by agents of the defendant in furtherance of their duty to investigate corrupt activities and crime within the police force and were made under oath in circumstances which justified their reception into evidence. It was thus submitted that as Botha was the investigating officer specifically tasked with the authority to investigate the matters in question and as his statements were made within the course and scope of performing these functions, his statements thus fell to be admitted into evidence.

[79] I am unable to agree with the submission. As I have already found, the contents of Botha's statements were entirely based on what had been told to him by the suspects. This was his unqualified testimony in court. In the circumstances the statements concerned cannot be admissible on the basis suggested.

[80] I now turn to consider the merits with regard to the remainder of the evidence.

[81] There is no doubt that the plaintiff sustained a loss of a substantial amount of cash during the robbery. The quantum of the plaintiff's loss is not disputed. It was submitted on behalf of the plaintiff that the robbery occurred with the participation, active or otherwise, of Kgathi, that Kgathi knew that the robbery was going to occur, and that Kgathi, who had a constitutional duty as a police officer to prevent the robbery from happening, failed to do so. The plaintiff conceded that there was no direct evidence implicating Kgathi in the robbery. However, it was submitted that, based on all the facts and circumstances of the case, an inference could be drawn about Kgathi's involvement in the robbery.

[82] Reliance was placed on Kritzinger's evidence, taken together with the DVD footage that was played in court. It was submitted that the fact that Kgathi arrived a few minutes before the arrival of the robbers at Montecasino, combined with the fact that he left shortly after the robbers had left, was sufficient basis for the conclusion that Kgathi had participated in the robbery.

[83] Kritzinger assumed that that the man in the white shirt appearing on the video had disembarked from the silver coloured BMW seen on the video driving into Montecasino. However, this is not what was actually seen on the video. Kritzinger testified that he was merely told by Dube that this man had come from that BMW. Significantly, Kritzinger said he had no personal knowledge whether this person was in fact one of the robbers.

[84] The video footage itself merely shows Kgathi, the person in a white shirt and Dube mingling around the gambling area. As the three are seen using their cellphones, I was then asked to draw an inference that they were communicating with one another. I am unable to come to that conclusion in the absence of any other evidence. It must be remembered that Kritzinger never even said that he could identify the face of the person in the white shirt. So all of his evidence is based on speculation.

[85] Reliance was also placed on Prof Fatti's evidence that Kgathi's presence at the casino on that Sunday afternoon was not a mere coincidence and that it had been pre-planned. However, Ms Turk the slot machine manager at Montecasino produced documentary evidence showing that Kgathi was a regular, if not a compulsive gambler at Montecasino. Records showed that Kgathi was a Platinum cardholder at the casino and that between 23 July 2001 to 13 September 2004 he regularly came to Montecasino, even on Sundays. Prof Fatti's evidence thus does not assist the plaintiff.

[86] I was asked to consider Kgathi's bad character on the basis that this was a species of similar evidence, and to admit that into evidence. In this regard it was submitted that Kgathi, Govender and Naidoo all had a *modus operandi* of stealing recoveries made from suspects in robberies. In this regard reliance was placed on the fact that Kgathi is presently serving a prison term albeit for an unrelated conviction involving theft of money or goods recovered during a police investigation. This submission is clearly

misconceived as I do not know all the facts of the case on which Kgati has been convicted.

[87] Quite importantly, Kgathi was charged criminally of theft of monies from Dube and the other suspects but was subsequently acquitted of all those charges by Synders J. I am accordingly unable to admit into evidence Kgathi's alleged bad character and that he had a propensity to commit the acts complained of by the plaintiff.

[88] I am fortified in this conclusion in particular by Botha's evidence. It must be remembered that Botha, who was in a way the plaintiff's main witness, testified that he investigated Kgathi in relation to his suspected participation in the robbery at Montecasino. He stated that after those investigations he was satisfied that Kgathi was not involved in the robbery. In his view if Kgathi had been involved in the robbery, he would have known where the money had been stashed.

[89] In the absence of any direct evidence implicating Kgathi, (something which was conceded by the plaintiff,) I am constrained to reject Botha's evidence that Kgathi not involved in the robbery. Because of my finding as aforesaid, it is unnecessary to consider whether Kgathi's alleged omission to prevent the robbery was within the course and scope of his employment with the second defendant.

[90] The court was asked, in the alternative, to infer from certain facts and circumstances of the case, that Kgathi and others had stolen money form Dube, Gumede and Lifuwa. The basis for this inference is that Kgathi and others had a *modus operandi* of stealing money from the robbers. Reliance was placed on Botha's hearsay testimony that Dube had told him that Kgathi had misappropriated about R3 million from him. It will be recalled that Botha had testified that Dube had told him about the presence of one Inspector Ackerman who was allegedly present when the money was recovered from Dube.Ackerman was never called as a witness. I was never informed whether there was any attempt made to subpoena Ackerman to come and testify on behalf of the plaintiff.

[91] The court was also asked to infer that Gumede, one of the suspects, must have been conveniently instructed by the SVC unit to "*disappear*". There is no evidence to support such a finding.

[92] The plaintiff tried to rely on the evidence of Moyo, namely that one Inspector Hall had confronted Dube in his presence saying that Dube had allowed himself to be put through the ordeal of a robbery for a mere R400 000,00. This was not corroborated in any way. The court was not informed if there was any attempt made by the plaintiff to subpoena Inspector Hall to come and testify on behalf of the plaintiff .

[93] Having considered all the evidence carefully, I am unable to find that Kgathi stole monies which were part of the recoveries made from the robbery

at Montecasino. On the proven facts, I find it unnecessary to consider whether Kgathi did so in the course and scope of his employment.

[94] In the circumstances I make the following order:

The plaintiff's claim is dismissed with costs, such costs to include the employment of two counsel.

_____

B H MBHA
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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Assited by Adv. A.Stein

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DATES OF HEARING: 11,12,15-18 February 2010

DATE OF JUDGMENT: 25 May 2010