REPUBLIC OF SOUTH AFRICA

IN THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHIC IS NOT APPLAINTIFFICABLE
[1] REPORTABLE: YES / NO
[2] OF INTEREST TO OTHER JUDGES:
YES / NO
[3] REVISED
DATE 5/5/15 SIGNATURE

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CASE NO: 34447/2013

DATES HEARD: 26/01 - 06/02/2015

In the matter between:

EUGENE VAN AS Plaintiff

and

ADT SECURITY (PTY) LTD Defendant

JUDGMENT

J W LOUW, J

[1] At about 20:15 on Thursday 26 January 2012, the plaintiff, a retired businessman, and his wife were having supper in the kitchen of their house which is situated on the corner of Carlmarie and Third Roads, Hyde

Park, Johannesburg. They had booked and paid for a holiday in Antarctica and were due to leave the next morning. While they were having supper, three armed robbers entered the kitchen and held them up at gunpoint. They attacked and badly injured the plaintiff and his wife and threatened to rape the plaintiff's wife if they weren't given the code to the safe. They made off with a substantial number of valuable items consisting mainly of electronic equipment, jewellery and clothing. The plaintiff then pressed the panic button of the alarm system of the house. The plaintiff at the time had a contract with the defendant for monitoring and responding to alarms ("the service agreement"). Officials of the defendant arrived shortly thereafter and the plaintiff asked them to summon an ambulance to take his wife to hospital.

[2] The plaintiff had by that time somehow managed to recover and wondered why the alarm had not gone off to warn them of the intrusion as it had been switched on and the control panel inside the house had indicated that it was on. He found out the next day that the system wasn't working along the northern perimeter wall of the property which abounds Carlmarie Road, which, according his observations and those of other persons, to which observations I will refer in more detail later, was the most likely place where the robbers had entered the property by scaling the wall.

[3] The plaintiff subsequently sued the defendant for damages arising from breach of contract. By agreement between the parties, an order was made that the quantum of the plaintiff's claim be separated from the merits and be postponed *sine die.* The plaintiff's claim is not based on a breach of the service agreement, but of an oral contract of *locatio conductio operis*. The plaintiff alleges in his particulars of claim that on 19 January 2012 and at Johannesburg, he and the defendant, represented by Robert Hood, entered into an oral agreement, the express, alternatively tacit, alternatively implied terms whereof were that

the defendant would repair the perimeter movement detection system on the property and, if necessary, replace any faulty equipment or wiring; that the defendant would repair the existing floodlights on the property so that they would automatically switch on and a distress signal would automatically be transmitted to the defendant's control room when the perimeter movement detection system was activated; that the plaintiff would pay the defendant's usual rates for the work done and material supplied; and that the work would on completion be fit for the purpose for which it was done. It is further alleged in the particulars of claim that the defendant during the period 19 to 26 January 2012 executed certain work to the alarm system, that the work performed by the defendant, alternatively the equipment installed by the defendant was defective in that the perimeter alarm system was not activated when the perimeter security line was breached and that the security system failed to transmit a distress signal to the defendant's control room when the perimeter security line was breached while the alarm system was active. It is accordingly alleged that the defendant breached the oral agreement.

[4] The defendant in its plea denied the existence of an oral agreement and pleaded that the plaintiff and the defendant, represented by one Irvine Atkins, on 28 November 2008 and at Hyde Park concluded three written agreements, copies of which are annexed to the plea. The first is the service agreement. The second is an addendum to the service agreement which, so it is alleged, relates to the provision of a fitted digi-pad to an electronic pedestrian gate. The third is an installation agreement which relates to the installation of a dipole antenna, a radio and a tele-plug. The defendant *inter alia* pleaded that the express, alternatively implied, alternatively tacit terms of the agreements were that the defendant would provide the plaintiff with security monitoring and armed response services using the installation that the plaintiff had previously installed at the property together with such modifications thereto as the defendant may recommend; that the plaintiff would

ensure that the alarm system was installed and maintained in a proper workmanlike manner; that the plaintiff acknowledged that the security services to be supplied by the defendant functioned as a deterrent and were not a guarantee of safety against or prevention of loss, liability, injury or damage of any nature; that the defendant would not be liable in law to the plaintiff in respect of any such loss when arising through the rendering or non-rendering of the security services or in delict or otherwise if such loss arises as a result of any innocent or negligent act or omission on the part of the defendant, save for gross negligent, fraudulent or malicious act or omission on the part of the defendant; that the plaintiff waived all such claims; that the agreements constituted the entire agreement between the parties and that no variation or waiver of rights would have any effect unless in writing and signed by the parties; and that the plaintiff was responsible for the ongoing maintenance of the alarm system or any part thereof which had not been installed by the defendant.

[5] It is further alleged in the plea that the plaintiff breached the agreement by failing to ensure that the alarm system was installed in a proper and workmanlike manner in that the wiring, the conduit piping and the electrical connections were incorrectly installed and that the perimeter beams were not of an industry approved standard and not installed in an industry approved manner and/or at an industry approved distance from each other. It will become apparent from what follows that these allegations are either incorrect or bear no relevance to the incident of 26 January 2012.

[6] The defendant's reliance on the three written agreements was clearly misplaced. The service agreement, on its first page, lists the service categories which the defendant provides, being maintenance, telephone monitoring, radio monitoring, armed response and "*other*". Next to each category, there is a square block which can be ticked to indicate which

services have to be provided in terms of the agreement. The services which were ticked by the plaintiff were radio monitoring, telephone monitoring and armed response. Maintenance was not ticked by the plaintiff. The service agreement expressly provides that the plaintiff would be responsible for the ongoing maintenance of the alarm system or any part thereof which had not been installed by the defendant. It was common cause that the alarm system had been installed by a sub-contractor to the builder whom the plaintiff had employed to renovate the Hydepark property before he and his wife moved there at the end of 2008 from Witkoppen where they had previously resided, and where the defendant had rendered similar monitoring and reaction services to the plaintiff. The addendum to the service agreement also expressly provides that the plaintiff will arrange for his own technician to carry out any necessary modification and/or repairs to the alarm system as may be advised by the defendant. It was conceded by Mr. Michael Kidson, the defendant's regional managing director, that if any maintenance was required by the plaintiff, it would have been done in terms of different *ad hoc* arrangements and that the aforesaid agreements and the disclaimer provisions therein did not apply to maintenance done by the defendant.

[7] The common cause evidence showed that the plaintiff on numerous occasions during the period 2010 to 2011 contacted either Mr. Robert Hood, who was at the time employed by the defendant as a senior service manager but whom the plaintiff had come to know as a technician while the plaintiff resided in Witkoppen, or Mr. Kidson, whom the plaintiff had also come to know in the Witkoppen days and who was at the time of the incident the defendant's general manager for operations, to effect repairs to his perimeter alarm system, the house alarm system, the CCTV camera system or the intercom system. The technician who was invariably dispatched to attend to the problem at hand was Mr. Michael Jansen Van Rensburg, whom the plaintiff came to regard as a competent technician. On each occasion, the defendant raised an invoice for the work which the

plaintiff then paid. In some instances nothing was charged. The invoices were in most instances completed by Van Rensburg himself after completion of the work. If he didn't know the prices, he phoned the office. The evidence accordingly showed that on each occasion that repairs were carried out, it was done pursuant to an oral *locatio conductio operis* agreement on terms as pleaded by the plaintiff.

[8] During January 2011, major repairs were carried out on the perimeter alarm system. The work included replacing all the perimeter movement detection beams which had been installed by the sub-contractor earlier referred to, and which were often the cause of false alarms, with Peritec beams. This was done at the plaintiff's insistence as such beams had functioned well at his Witkoppen residence. The Peritec beams were not stocked by the defendant and were supplied by the plaintiff to Van Rensburg. A beam consists of two components, a transmitter and a receiver. The two components are placed a distance from each other and are lined up facing each other. If the alarm system is armed and the security line between the two components is breached, the alarm will be activated.

[9] On 21 December 2011, the plaintiff sent an e-mail to Hood in which he complained about the service which he had received from a field line manager of the defendant, one Eric Gous. The plaintiff listed a number of problems which needed to be attended to. Hood responded by suggesting that a meeting be arranged in the new year. The meeting was subsequently arranged for 19 January 2012. However, before the meeting could take place, the plaintiff's perimeter alarm system was struck by lightning. Van Rensburg effected certain repairs on 12 January 2012, for which the plaintiff was invoiced.

[10] The meeting which had been scheduled for 19 January 2012 took place as planned. It was attended by Hood, Van Rensburg and a Mr Van

der Vost on behalf of the defendant. The plaintiff thereafter, on 24 January 2012, wrote an e-mail to Hood in which he recorded what had been agreed at the meeting. The relevant part of the e-mail reads as follows:

"We agreed when you were here that prior to my going away overseas on Friday we would deal with the urgent items in particular try and do the ones which are on the basic security issue and then when I am back at (sic) *there is more time, we would tackle the other items.*

.....

The security items which we must get fixed are:

a) The gate camera which has been struck by lightning

b) The security beams around the outside of the house in particular, I understand that the Carlmarie beam is out of order and needs to be replaced and of course we have to rewire the beams as discussed on the West side, that's Centre West and North West.

We also have to fix the timer on the security lights which does not come on, it's been apparently struck by lightning and needs to be replaced."

[11] Hood responded by e-mail that Van Rensburg would be scheduled to do the work on 25 January, alternatively on 26 January 2012. The plaintiff and his wife were due to leave for Antarctica on Friday 27 January 2012.

[12] It is common cause that Van Rensburg worked on the system on 26 January 2012. The defendant pleaded that Van Rensburg repaired the outer perimeter beams along Carlmarie Road, which *inter alia* included the replacement of one outer perimeter beam by a beam specifically chosen by the plaintiff, against the advice of the defendant, the alignment of the perimeter beams and the replacement of the "time-boards" connected to the floodlights to switch on automatically when the perimeter beam detection system was activated. The allegation that Van

Rensburg installed a beam chosen by the plaintiff against the advice of the defendant is simply untrue. Counsel for the defendant, Adv Docrat, attempted to show during her cross-examination of the plaintiff that the plaintiff was unreasonable, that he insisted that his instructions be carried out by the defendant's employees and that he refused to follow the defendant's advice. This was obviously done in an attempt to prove that what had gone wrong on the night in question was the plaintiff's own fault. The attempt was unsuccessful. It is so that the plaintiff did not follow the defendant's advice to rewire the system where the wiring had not been installed in conduit piping by the sub-contractor who had done the installation, but that played no role in the failure of the system to activate on the night in question. It is also correct that the plaintiff insisted that Peritec beams be used which he supplied, but the use thereof was not against the advice of any of the defendant's employees. The evidence of the defendant's witnesses showed that it was simply a case of the defendant normally using Optech beams which it carried as part of its stock. It had no objection to the installation of the Peritec beams which were supplied by the plaintiff.

[13] The principal issue to be decided in this matter is what caused the failure of the alarm system on the night in question and whether such failure was due to negligent work on the part of the defendant.

[14] Adv. Ellis SC, who appeared for the plaintiff, stated in his opening address that the plaintiff's case was that the perimeter alarm system was incorrectly wired by the defendant in that a "*bridge*" had been installed in the control panel inside the house which created the impression, when looking at the control panel, that the system was functional whereas it was not. It was further the plaintiff's case that the system had been incorrectly wired and not according to the industry standard, it having been wired "*normally* open" instead of "*normally closed*". The submission was that the effect of all this was that the system did not detect

movement across the Carlmarie wall and therefore did not set off the alarm or switch on the floodlights.

[15] In support of the plaintiff's contention that the alarm system had been bridged and to explain the effect of wiring a system normally open as opposed to normally closed, the plaintiff called Mr. Zeyn Khan as an expert witness. Mr. Khan owns a security business which provides electronic security systems such as alarm systems, gate automation, intercoms and CCTV to its customers. He has between 6 and 8 years hands-on experience. When his business became sustainable, he appointed technicians to do the work and whom he assists where necessary. He does not regard the work as highly intricate but as rather simple.

[16] Mr. Khan explained that the terms "*normally open*" and "*normally closed*" are used in respect of a device such as a beam. It was common cause that the industry standard was that beams should be wired normally closed. If all the beams in the system are wired normally closed, the alarm system is ready for arming. If one of the beams becomes defective, the alarm system cannot be armed and the control panel will show that there is a problem in that specific zone. The user will therefore be made aware of a problem in that particular zone. My understanding of his evidence is that if the beams are wired normally open, the user will be able to arm the system without becoming aware of a problem in a particular zone.

[17] It was further common cause that the industry standard required that the resistor, which is a necessary component and whose purpose it is to monitor the condition of the alarm system and to have the system closed, should be fitted inside the beam, which is referred to as "*end-of-line*". In earlier years, resistors used to be fitted inside the alarm control panel. The evidence of the defendant's technician Mr. Van Rensburg was

that if a cable was broken, it would not show up on the keypad if the resistor was installed in the control panel. It follows that the user would then not be aware of the problem and would be able to arm the alarm.

[18] Mr. Khan further explained that a user of an alarm system would not become aware of a defective beam by looking at the keypad in the control panel if the beam were physically *"bridged out"*. The bridging out or by-passing of the beam will disable that particular zone and the user would be able to arm the alarm system despite the defective beam. The alarm will then not activate if the security line protected by the beam in question is breached. He referred to the bridging out of a device as a trick of the trade which is used to fool a client if there was a problem which was time consuming to solve.

[19] Mr. Khan's expertise was challenged by Ms. Docrat. In my view, he was sufficiently experienced in the industry to be regarded as an expert. I found him to be a credible witness who stood his ground despite grueling cross-examination and I have no hesitation in accepting his evidence.

[20] The defendant did not call any expert witness but presented the evidence of Mr. Van Rensburg who carried out the repair work on 26 January 2012. Mr. Van Rensburg was an unimpressive witness. He was evasive in answering many questions and he clearly lied in respect of an important aspect to which I will revert. His evidence was that when he replaced all the existing beams with Peritec beams, he left the connections normally open as that was the way in which the previous beams had been wired. He said that he didn't worry about that because the system would still function. His concern was to lift the voltage to the beams because of the frequent false alarms. If he had done the original installation, he would have wired the beams normally closed and fitted the resistors end-of-line. He was never satisfied going to the plaintiff's

premises because there was always something which broke. Having to go back and forth irritated him.

[21] Mr. Hood testified that at the meeting of 19 January 2012, the plaintiff was informed that the defendant would no longer be installing equipment supplied by the plaintiff because the defendant needed guarantees in respect of the equipment it was utilizing. He said that the plaintiff understood and accepted the position.

[22] Van Rensburg testified that on 26 January 2012, he replaced the timer board of the floodlights, rewired the beams on the centre west and north-west wall and replaced the LED lights on the intercoms which had been damaged by the lightning. The invoice which he wrote out for the work done does not reflect that he replaced the damaged beam on Carlmarie road, but he insisted that he did and said that a new Peritec beam was brought to him by his field line manager, Mr. Eric Gous, while he was busy doing the work at the plaintiff's property. The plaintiff's two gardeners, who had been working in the garden, denied that anyone had brought anything to Mr. Van Rensburg. What they both saw was a motorcar arriving and park outside the property. A man got out of the car and spoke to Van Rensburg while he was on top of the Carlmarie wall. They both described the person as having a coffee-coloured skin with an Afro hairstyle. There were other occupants inside the car, but they did not get out. The gardeners did not hear what was discussed between Van Rensburg and the person with the Afro hairstyle who drove away after the discussion. All of this was denied by Van Rensburg. Van Rensburg gave a description of Mr. Eric Gous, which was nothing like that of the person described by the two gardeners. Mr. Gous was not called to confirm that he brought the Peritec beam to Van Rensburg on that day.

[23] Despite the aforegoing, Adv. Ellis SC, who appeared for the plaintiff, indicated that it was not disputed that the Peritec beam was brought to

Van Rensburg by Eric Gous and that it was common cause that the Carlmarie beam was replaced with the Peritec beam by Van Rensburg on 26 January 2012.

[24] Mr. Van Rensburg further testified that he was assisted by Maurice Dineo when carrying out the work on that day. As previously explained, a beam consists of two parts, being a transmitter and a receiver. Van Rensburg replaced the part on the eastern end of the Carlmarie wall and Dineo replaced the one on the western end of the wall. They then aligned the two parts of the beam. On Peritec beams there are three LED lights which light up once the beams are aligned.

[25] After the beam was installed and aligned, Mr. Van Rensburg said that he tested whether it worked by asking Dineo to go to the keypad in the house to see if it showed up when he, Van Rensburg, moved his body in front of the beam. They communicated with each other by two-way radio. After completing all the work, of which the replacing of the Carlmarie beam was the last, he spoke to the plaintiff. He could not remember whether the plaintiff was at home or whether he spoke to him on the phone, but he did tell the plaintiff what work he had done. The plaintiff's evidence was that he was at home when Van Rensburg spoke to him and that Van Rensburg showed him that the floodlights were working.

[26] It was common cause that Van Rensburg had, save for the Peritec beam delivered by Gous, previously replaced all the beams which had been installed by the original installer with Peritec beams supplied by the plaintiff. He confirmed in cross-examination that he had wired all of the beams in the same way as the previous beams had been wired, i.e. normally open. He further repeatedly stated that the resistors were connected end-of-line but normally open. They were not part of the beams, but were installed inside the beam. He was asked whether, in view of the fact that the position of the resistors was a contentious issue,

he had informed defendant's counsel that the resistors had been connected end-of-line. His first answer was that it was difficult to say and that he told counsel that it was normally open. When the question was repeated, he said that he could not recall telling counsel. When it was put to him that it had not been disputed by the defendant that the resistors were not installed end-of-line, his answer was that a 5,6 ohm resistor would work whether installed in the control panel or in the beam, but repeated that they were installed end-of-line and normally open.

[27] Mr. Van Rensburg was then confronted by a written statement made by Mr. Hood regarding his findings during an inspection he conducted at the plaintiff's premises on 31 January 2012 which was attended by Van Rensburg and Dineo. The statement records that the three of them conducted the required test on all the devices on the perimeter system. The first of the findings was that all the zones on the perimeter system were connected as normally open. The statement also records what was done to rectify the findings. In respect of the first finding, all zones were changed to normally open and the resistors were moved to end-of-line. Mr. Van Rensburg's answer was that the resistors had been installed end-of-line in the beams but that, because of the false alarms they were getting, he had instructed Dineo to remove the resistors from the beams and to install them in the control panel inside the house in the normally open position. This was done approximately a year before. This evidence, which emerged for the first time during cross-examination, directly contradicted his earlier evidence that the resistors were installed end-of-line in the beams. His earlier evidence was therefore an obvious lie.

[28] It was put to him that the effect of placing the resistors in the control panel was to manually by-pass the system so that the user would not know if there was a problem. His answer was that it would show up on the panel if there was a short on a cable, but not if a cable was broken.

The reason why he had moved the resistors to the panel was because cables had broken which he had had to replace. He agreed that he was acutely aware of the importance of the position of the resistors. When asked why he gave this evidence for the first time on the seventh day of the trial, he said that it was difficult to explain how the system works and that was why he had just said that the system had been wired normally open. When asked why he did not mention it during his evidence in chief after hearing Khan's evidence, his nonsensical answer was that the defendant had not installed the system and that a lot of things were left as they were.

[29] Mr. Robert Hood, who at the time of the trial was employed by the defendant as a technical field line manager, confirmed that the industry standard was to install beams normally closed with the resistor situated end-of-line. The reason was that all circuits have to be closed when arming the system. The system cannot be armed if any circuit is open, unless such circuit is by-passed. The purpose of installing the resistor end-of-line is so that it can read the resistance throughout the entire loop of the panel and detect any fault. Although he did not agree with the plaintiff's evidence that he was horrified when he found during his inspection a few days after the incident that the plaintiff would have been able to arm the system with the keypad on the control panel without knowing that the zone in question was not functioning, it nevertheless appears from his report that the situation was immediately, i.e. on the day of the inspection, rectified by changing the wiring from normally open to normally closed and by moving the resistors from the control panel to end-of line. He had been unaware that Van Rensburg had moved the resistors from end-of line to the control panel and was only told of that by Van Rensburg the day before he (Hood) gave evidence.

[30] Another important piece of evidence that surfaced for the first time during Van Rensburg's cross-examination was that when he and the other

officials of the defendant (Hood and Dineo) went back a few days after the incident to check the system, they found that the relay inside the Carlmarie beam was not closing. He presumed that something had gone wrong with the relay between him completing the installation of the beam and the time when the robbery took place. He said that the relay was not tested by him because they are not allowed to open the device to examine the relay. The beam was, however, sent back to the supplier for testing. One would have expected a report to have been produced by the supplier at the instance of the defendant, but no such report was discovered by the defendant.

[31] No mention is made in Hood's report of a faulty relay. He also did not testify about a faulty relay during his evidence in chief. During cross-examination he, however, stated that his observation when checking the system was that the beam was faulty because the relay stayed in a static position when the beam was triggered instead of changing from normally closed to open or *vice versa.* He didn't inspect the relay and didn't know what the fault was to cause it to stay in that position. When asked by the court how he knew that it stayed in a static position, he said that he tested the beam the next day with a multi-meter and the relay didn't open or close.

[32] The defendant did its own internal technical investigation into the malfunction of the system and a report was prepared in that regard which was provided to Mr. Michael Kidson. Mr. Kidson confirmed that the report had been given to the defendant's lawyers, but could not explain why it had not been discovered by the defendant. Ms Docrat submitted that the report was a privileged document, but it was not listed in the schedule of privileged documents annexed to the defendant's discovery affidavit. The evidence indicated that litigation was not contemplated at the time when the report was produced and it therefore appears that it should have been discovered by the defendant as a non-privileged document. If the report

by the supplier, if there was one, or the defendant's internal investigation report had indicated that a faulty relay had been the cause of the malfunction, I have no doubt that it would have been pleaded by the defendant as a defence to the plaintiff's claim, that expert evidence would have been presented in this regard and that the defendant would have made sure that those reports were placed before the court. A finding that the relay was defective would have been a complete answer to the plaintiff's claim.

[33] This leaves only two probable causes for the malfunctioning of the alarm system: the wiring of the system normally open (as opposed to normally closed) and/or the installation of the resistors in the control panel (instead of end-of-line), both of which were contrary to the accepted industry standard, or the deliberate bridging or by-passing of the zone in question in the control panel as suggested by Mr. Khan. Both instances would constitute a breach of the oral agreement between the parties which would render the defendant liable for the damage which the plaintiff suffered if such damage was the result of such breach. It was conceded by Mr. Kidson that the purpose of a perimeter alarm system is to act as a deterrent to intruders and to enable the user to take preventative action while the intruder was still far enough away. The plaintiff's uncontested evidence was that had the alarm functioned properly with the siren sounding and the floodlights being activated, he would have looked to see if someone was coming across the lawn as that was the only way, he would have pressed the panic button and he would have locked the patio doors. The rest of the doors of the house were already locked.

[34] I referred earlier to the observations of the plaintiff and those of other persons that the Carlmarie wall was the most likely place where the robbers had entered the property by scaling the wall. It was, however, argued by Ms Docrat that there were other probable ways in which the

robbers could have gained entry and that the plaintiff had therefore failed to prove that the probable cause of the damage which the plaintiff suffered was the result of any negligent conduct on the part of the defendant. Various other ways in which the robbers could have gained entry to the property were put to the plaintiff during cross-examination, but the only one which was ultimately argued my Ms Docrat as a probability was that the robbers had gained entry to the property during the time that the alarm was inactive and that they then hid in the garden until it was dark before making their attack.

[35] The plaintiff's evidence in this regard was that he saw the following morning that there were footmarks on the inside and outside of the Carlmarie wall at the Third Road end. He also saw that a shelter had been made amongst the agapanthus plants in the bed next to the wall. The plant growth on the inside of the wall had been flattened. He also found human faeces in the area and saw that one of the robbers had left a pair of gloves behind in that area. The gloves had been discovered by one of his gardeners and were removed by the police. All three robbers had worn gloves while the plaintiff and his wife were being robbed. The plaintiff showed the scuff marks on the wall to Hood and other officials of the defendant and to police officers who came to the property. No one disputed that that was the most likely place where the robbers had entered the property and there was no evidence that they may have entered anywhere else.

[36] Hood's evidence was that when he visited the plaintiff's property the day after the incident, he found that the Carlmarie beam was not working. He focused on that beam because the indications were that the intruders had come through in that area. He saw the scuff marks on the wall and the plants which had been flattened. This was also seen by the defendant's internal investigators. In cross-examination he said that it

was logical that it was there where the intruders had gained entrance and that this was also indicated by the investigators and the garden staff.

[37] It was common cause that the alarm was not activated on the day in question from 17:34 to 18:25 as evidenced by the events log, also referred to as the events buffer, produced by the defendant's computer system. The plaintiff's evidence was that he had switched the alarm off when it was triggered at 17:34 and had dispatched his two gardeners to check if it had been triggered by overhanging branches. The evidence of the plaintiff's gardeners was that their inspection revealed that it had been triggered by Hadeda birds at the zone referred to as the rose garden. The plaintiff then switched it back on at 18:25.

[38] It was suggested to the plaintiff by Ms Docrat that there were many hiding places in the garden and that the intruders could have entered the property during the time that the alarm was switched off and that they could have hidden somewhere until it was dark before they made their move, which was at approximately 20:15. It must be remembered that during the time the alarm was inactive it was still daylight. The plaintiff's response to Ms Docrat's suggestion was that it was unlikely that the intruders would not have been detected while scaling the wall as they would have had to put up a ladder against the outside of the wall, which was 3 metres high, and would have had to jump down 3 metres on the inside. He further said that they would have been detected by his two big dogs who were in the garden at the time and that the gardeners would also have seen them when they investigated the cause of the false alarm as they look behind the lower shrubs to see if there is anything higher which could have triggered the alarm when they do such inspections.

[39] The evidence of Mr. Boy Tshabalala, one of the plaintiff's gardeners who has been working for the plaintiff for 39 years, was that when the alarm goes off, they, i.e. the gardeners, have to check the control panel

to see in which zone the alarm was triggered. He found that the alarm had been triggered by Hadeda birds in the rose garden zone. They then did a further investigation. He denied that it would be possible for someone to hide and not be seen by them. The other gardener, Mr. Julius Moyo, testified that after the alarm went off that afternoon, he and Tshabalala took off with the dogs and walked along the perimeter walls of the property to check if there were any overhanging tree branches. This was a standard procedure which they had to follow. They found that everything was clear and reported thus to the plaintiff.

[40] Mr. Moyo testified that when the police were there the day after the robbery, he saw the signs which indicated where the robbers had entered. He saw the gloves, the defecation, the footprints on the wall and the trampled plants on the inside and the outside of the wall. He also referred to a steel pillar against the wall, about 10 cm from the wall, to which the beam was fitted and on which there were footprints. In cross-examination, he said that he had overheard one of the investigators mentioning that robbers believed if they defecated on a property, they would not be caught.

[41] In view of all of the above evidence, it is in my view extremely unlikely that the robbers gained entry to the property from a public road in broad daylight during the time when the alarm system was not activated without being seen by anyone or being detected by the dogs, that they then managed to hide without being seen by the gardeners or the dogs during the gardeners' inspection and that they then waited for approximately two hours before making their move. In my view, the probabilities are much greater that the robbers scaled the wall when it was dark and when the alarm system was activated but not working, that they entered the house shortly thereafter and attacked and robbed the plaintiff and his wife. That they were able to do so, was caused by the defendant's breach of the oral agfreemnt to which I have referred above.

[42] I accordingly make the following order:

(a) It is declared that the defendant is liable for such damage as the plaintiff is able to prove arising from the defendant's breach of the oral agreement concluded between the parties in terms whereof the defendant effected repairs to the plaintiff's perimeter alarm system on 26 January 2012.

(b) The defendant is ordered to pay the plaintiff's costs, such costs to include the qualifying fees of the plaintiff's expert witness Mr. Zeyd Khan, the costs of the private interpreter employed by the plaintiff and the costs of senior counsel.

Counsel for plaintiff: Adv. P. Ellis SC
Instructed by: Alex Bosman Attorneys, Pretoria
Counsel for defendant: Adv. F.F. Docrat
Instructed by: Hogan Lovells (South Africa), Johannesburg