Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: 2828/2010

In the matter between:

OSMAN TYRES AND SPARES CC	First Plaintiff
SHIRAZ OSMAN	Second Plaintiff

and

ADT SECURITY (PTY) LTD	Defendant

DATE OF HEARING	:	30 OCTOBER 2017
DATE OF JUDGMENT	:	07 DECEMBER 2017
COUNSEL FOR THE PLAINTIFF	:	ADV. RAMAILI
COUNSEL FOR THE DEFENDANT	:	ADV. VAN NIEKERK

JUDGMENT

HENDRICKS J

Introduction

[1] On 16th February 2005 Mr. Shiraz Mohammed Osman *(Mr. Osman)* on behalf of Osman Tyres and Spares CC (*first plaintiff*), entered into a written agreement with ADT Security (Pty) Ltd *(defendant),* duly represented by Rina du Toit, for the supply of security services at first plaintiff's business premises situated at 28 Hollyhock Street, Ziniaville, in Rustenburg. The security service was for telephone and radio monitoring as well as armed response.

[2] Mr. Osman testified that on 21st December 2007 at 06H48 he received a text message (sms) on his cellular phone about the alarm that went off at the first plaintiff's business premises. He tried in vain to contact the security officers of the defendant. He went to the business premises of the first plaintiff around 08H00 and found that a burglary had taken place. The front door was broken and wide open. The defendant did not contact him and neither was there any security officer of the defendant on the premises. At the front door, he found a slip of the defendant indicating that the premises was visited by a security officer at 00H28 and everything was intact. As a result of the burglary, goods were stolen and some items were damaged. An action for damages was instituted for and on behalf of the first plaintiff in the amount of R487 990.00 (claim 1) and by Mr. Osman, in his personal capacity, in the amount of R111 046.00 (claim 2).

[3] The merits and quantum were separated and the trial proceeded on the merits only. This Court is called upon to determine liability, if any, on the part of the defendant towards both the first and second plaintiff. It is alleged by the plaintiffs in their particulars of claim attached to the summons, that the damages suffered by the first plaintiff as a result of the burglary, were caused by the sole negligence alternatively gross negligence of the defendant because it neglected its duty of care or did not exercise reasonable care towards the first plaintiff's premises as it was contractually obliged to do (contractual claim). As far as the second plaintiff is concerned, it is alleged that he suffered emotional damages, which damages were caused by the sole negligence alternatively gross negligence of the defendant. As a result of emotional trauma, the second plaintiff had to attend specialist psychiatry treatment (delictual claim).

[4] In its plea, the defendant denies liability based on the terms of the written agreement entered into between the parties. It pleaded that in terms of clause 6.1 of the agreement, the defendant was under no obligation to provide any guarantee or assurance against any loss, liability, injury or damage of whatsoever nature and howsoever arising. In terms of clause 6.2 of the agreement, the defendant is not liable for any loss, liability, injury, damage or claims of whatsoever nature arising through the rendering or non-rendering or attempted rendering of services by the defendant in delict or otherwise. Furthermore, in terms of Clause 6.6 the first plaintiff irrevocably waived all and any such claims and indemnified the defendant

against all claims of third parties arising out of acts or omissions. Mr. Osman is the only witness that testified on behalf of both plaintiffs. After the close of Plaintiff's case, defence counsel, Adv. Van Niekerk, applied for absolution from the instance. Adv. Ramaili opposed the application for absolution from the instance.

The Law

[5] It is trite law that the onus rests on the plaintiffs to prove their case on a balance of probabilities. In "**The Civil Practice of the High Courts of South Africa**", 5th ed. at page 895 the following is stated:

> *"In Pillay v Krishna, Davis AJA stated the three basic rules which govern the incidence of the burden of proof - the onus probandi, which is a matter of substantive law and not a question of evidence as:*
>
> *(a) If one person claims something from another in a Court of law, then he has to satisfy the Court that he is entitled to it.*
> *(b) Where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence, then he is regarded qouad that defence as being the claimant. For his defence to be upheld he must satisfy the Court that he is entitled to succeed on it.*
> *(c) He who asserts, proves and not he who denies, since a denial of a fact cannot naturally be proved provided that it is a fact that is denied and that the denial is absolute.*
>
> *He continued as follows:*

But I must make three further observations. The first is that, in my opinion, the only correct use of the word 'onus' is that which I believe to be its true and original sense (cf D. 31.22), namely, the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be, and not in the sense merely of his duty to adduce evidence to combat a prima fade case made by his opponent. The second is that, where there are several and distinct issues, for instance a claim and a special defence, then there are several and distinct burdens of proof, which have nothing to do with each other, save of course that the second will not arise until the first has been discharged. The third point is that the onus, in the sense in which I use the word, can never shift from the party upon whom it originally rested. It may have been completely discharged once and for all, not by any evidence which he has led, but by some admission made by his opponent on the pleadings (or even during the course of the case), so that he can never be asked to do anything more in regard thereto; but the onus which then rests upon his opponent is not one which has been transferred to him: It is an entirely different onus, namely the onus of establishing any special defence which he may have. Any confusion that there may be has arisen, as I think, because the word onus has often been used in one and the same judgment in different senses, as meaning (1) the full onus which lies initially on one of the parties to prove his case, (2) the quite different full onus which lies on the other party to prove his case on a quite different issue, and (3) the duty on both parties in turn to combat by evidence any prima facie case so far made by his opponent: this duty alone unlike a true onus, shifts or is transferred."

See: **Macleod v Kweyiya** (365/12) [2013] ZASCA 28 (27 March 2013).

[6] Absolution from the instance can be applied for by a defendant when, at the close of the plaintiff's case, there is no evidence upon which a court may find in favour of the plaintiff. Rule 39 (6) provides:

> *"At the close of the case for the plaintiff, the defendant may apply for absolution from the instance, in which event the defendant or one advocate on his behalf may address the court and the plaintiff or one advocate on his behalf may reply. The defendant or his advocate may thereupon reply on any matter arising out of the address of the plaintiff or his advocate."*

In **Gordon Lloyd Page & Associates v Rivera and Another** 2001 (1) SA 88 (SCA) the following is stated in paragraph [2] on pages 92 - 93:-

> *"[2] The test for absolution to be applied by a trial court at the end of a plaintiff's case was formulated in Claude Neon Lights (SA) Ltd v Daniel1976 (4) SA 403 (A) at 409G - H in these terms:*
>
> > *'. . . (W)hen absolution from the instance is sought at the close of plaintiff's case, the test to be applied is not whether the evidence led by plaintiff establishes what would finally be required to be established, but whether there is evidence upon which a Court,*

applying its mind reasonably to such evidence, could or might (not should, nor ought to) find for the plaintiff. (Gascoyne v Paul and Hunter 1917 TPD 170 at 173; Ruto Flour Mills (Pty) Ltd v Adelson (2)1958 (4) SA 307 (T).)'

This implies that a plaintiff has to make out a prima facie case - in the sense that there is evidence relating to all the elements of the claim - to survive absolution because without such evidence no court could find for the plaintiff (Marine & Trade Insurance Co Ltd v Van der Schyff 1972 (1) SA 26 (A) at 37G - 38A; Schmidt Bewysreg4th ed at 91 - 2). As far as inferences from the evidence are concerned, the inference relied upon by the plaintiff must be a reasonable one, not the only reasonable one (Schmidt at 93). The test has from time to time been formulated in different terms, especially it has been said that the court must consider whether there is 'evidence upon which a reasonable man might find for the plaintiff' (Gascoyne (loc cit)) - a test which had its origin in jury trials when the 'reasonable man' was a reasonable member of the jury (Ruto Flour Mills). Such a formulation tends to cloud the issue. The court ought not to be concerned with what someone else might think; it should rather be concerned with its own judgment and not that of another 'reasonable' person or court. Having said this, absolution at the end of a plaintiff's case, in the ordinary course of events, will nevertheless be granted sparingly but when the occasion arises, a court should order it in the interests of justice. Although Wunsh J was conscious of the correct

test, I am not convinced that he always applied it correctly although, as will appear, his final conclusion was correct."

[7] It is common cause that an agreement was entered into between the parties as alluded to earlier on in this judgment. To reiterate, this agreement was entered into between the first plaintiff and the defendant. There was no agreement (written or oral) entered into between the second plaintiff and the defendant. Mr. Osman, acting on behalf of the first plaintiff, testified that he did not read the terms and conditions before he signed the agreement. The onus is however on a party to an agreement to familiarize himself/herself with the contents thereof.

[8] Insofar as the contractual claim is concerned, one is guided by the terms and conditions of the agreement. Clause 6.1 provides:

"6.1 The Customer acknowledges that to the extent that the Services function as a deterrent, they are not a guarantee of safety against or prevention of loss liability, injury and damage of whatsoever nature and howsoever arising. Accordingly while ADT shall exercise reasonable care in the installation of the System and in the rendering of the Services, nothing herein contained shall be construed or interpreted in any manner whatsoever as providing the Customer or any third party whomsoever with any guarantee or assurance of safety or against any loss, liability, injury or damage of whatsoever nature and howsoever arising."

In terms of this clause, the defendant did not agree or give an assurance of safety against any loss, liability, injury or damage of whatsoever nature and howsoever arising.

[9] Clause 6.2 provides:

> *"6.2 Subject to the provisions of the Act, neither ADT nor any other persons for whom ADT maybe liable in law shall be liable to the Customer in respect of or pursuant to any loss, liability, injury, damage or claims of whatsoever nature (including without limitation any loss of profits and/or any special and/or consequential loss or damages) whether arising through the rendering or non-rendering or attempted rendering by ADT of the Services in terms of this Agreement or in delict or otherwise whether at the Premises if any such loss, liability, injury, damage or claims arise as a result of or pursuant to any innocent or negligent act or omission on the part of ADT or any other persons for whom ADT maybe liable in law."*

In terms of this clause, the defendant is not liable to the first plaintiff in respect of or pursuant to any loss, liability, injury, damage or claims of whatsoever nature arising from the rendering or non-rendering or attempted rendering of services in terms of the agreement or in delict or otherwise. This is in respect of any claim that may arise as a result of or pursuant to any innocent or negligent act or omission on the part of the defendant.

[10] Clause 6.3 provides:

> *"Subject to the provisions of the Act, the Customer:*
>
> *6.3.1 hereby irrevocably waives all and any such claims referred to in clause 6.2 above;"*

This means that the first plaintiff irrevocably waived all and any claims that may arise out of contractual or delictual acts or omissions on the part of the defendant.

And Clause 6.3.2 states:

> *"Subject to the provisions of the Act, the Customer:*
>
> *6.3.2 hereby irrevocably indemnifies ADT or any other person for whom ADT may be liable in law against all claims of third parties arising out of the said acts or omissions, as referred to in clause 6.2 above, at the Premises."*

This means that the first plaintiff irrevocably indemnified the defendant or any other person against all claims of third parties arising out of acts or omissions. Third parties in terms of this clause include, in my view, the second plaintiff in his personal capacity.

[11] Clause 6.6 provides:

> *"6.6 The Customers hereby agree and acknowledge that the System and/or the Services are complementary to insurance cover and do not provide an alternative to such insurance cover. It remains at all times the duty of the Customer to ensure that the Customer has adequate insurance where necessary and that the Premises and contests thereof (including the premises for which the Customer, not being the owner thereof, is nevertheless responsible) are adequately insured."*

In terms of clause 6.6, the first plaintiff agreed and acknowledged that the defendant's services were complementary to insurance cover and did not provide an alternative to such insurance cover. It remained at all times the first plaintiff's duty to ensure that it had adequate insurance for the premises and the contents thereof. The first plaintiff was insured. This much is clear from the particulars of claim in which it is indicated that some of the damages arises due to a shortfall to what the insurance paid.

[12] Insofar as claim 2 by the second plaintiff is concerned, no evidence whatsoever was led to establish a cause of action. The second plaintiff did not testify in any detail about the emotional stress, trauma and depression he suffered as a result of the burglary. No expert and/or medical evidence was tendered. This, coupled with the fact

that clause 6.2 exonerate the defendant from liability arising out of delict, put paid to claim 2 of the second plaintiff.

[13] Similarly, in terms of clause 6.1 read with clause 6.3.1 and clause 6.3.2 there is no obligation (contractually or otherwise) on the defendant in the form of a guarantee or assurance to safeguard the first plaintiff against any form of loss. Clause 6.6 states irrevocably that the security services is not complementary or an alternative to insurance. On behalf of the first plaintiff, Mr. Osman signed the agreement and agreed to the terms and conditions thereof at his own peril. The maxim *'caveat contractor'* applied equally to the first plaintiff and the defendant.

[14] In my view, the plaintiffs failed to make out a case on the probabilities. This Court cannot, on the evidence presented, find in favour of the plaintiff. Absolution from the instance should therefore be granted.

Order

[15] Consequently, the following order is made:

(i) Absolution from the instance is granted.

(ii) The First and Second Plaintiffs are ordered to pay the costs of suit, jointly and severally, the one paying the other to be absolved.

R D HENDRICKS
JUDGE OF THE HIGH COURT,
NORTH WEST DIVISION, MAHIKENG